

OFFICE COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1965

No. 341

FLOYD A. WALLIS, PETITIONER,

vs.

**PAN AMERICAN PETROLEUM CORPORATION,
ET AL.**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

PETITION FOR CERTIORARI FILED JULY 12, 1965

CERTIORARI GRANTED OCTOBER 11, 1965

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 341

FLOYD A. WALLIS, PETITIONER,

vs.

PAN AMERICAN PETROLEUM CORPORATION,
ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

INDEX

	Original	Print
Record from the United States District Court for the Eastern District of Louisiana, New Orleans Division		
Complaint of Patrick A. McKenna in Case No. 8904	1	1
Exhibit A—Letter agreement from Floyd A. Wallis to Mr. Patrick McKenna, dated December 27, 1954 (Item 20—Wallis' Note of Evidence)	10a	8
Answer of Floyd A. Wallis to complaint	11	9
Answer of Pan-American Petroleum Corporation to complaint	24	20
Amended answer of Floyd A. Wallis to complaint	153	24
Order that no parol evidence shall be admitted in C.A. #8904 to establish plaintiff's interest in the real property, etc., dated July 20, 1961	189	30

RECORD PRESS, PRINTERS, NEW YORK, N. Y., NOVEMBER 22, 1965

	Original	Print
Record from the United States District Court for the Eastern District of Louisiana, New Orleans Division—Continued		
Complaint of Pan American Petroleum Corporation in Case No. 8937	195	32
Exhibit P-1—Option agreement between Floyd A. Wallis and Stanolind Oil and Gas Company (Pan American Petroleum Corporation), dated March 3, 1955 (excerpts)	203a	40
Answer of Floyd A. Wallis to complaint	210	45
Amended answer of Floyd A. Wallis	217	50
Federal Oil and Gas Lease BLM 042017 issued to Floyd A. Wallis, executed March 6, 1956, effective as of January 1, 1959 with Exhibit A (Item 120—Wallis' Note of Evidence)	224a	57
Opinion, Wright, J.	1847	65
Judgment	1895	75
Proceedings in the United States Court of Appeals for the Fifth Circuit	1977	77
Minute entry of argument and submission (omitted in printing)	1977	77
Opinion, Rives, J.	1978	78
Dissenting opinion, Wisdom, J.	1989	86
Judgment	1994	89
Petition of Floyd A. Wallis for rehearing	1995	91
Opinion on petitions for rehearing, Rives, J.—		
Order denying rehearing	2209	107
Dissenting opinion, Wisdom, J.	2218	114
Clerk's certificate (omitted in printing)	2241	134
Order allowing certiorari	2242	134

[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

No. 8904

Civil Action

PATRICK A. McKENNA

versus

FLOYD A. WALLIS and PAN AMERICAN PETROLEUM
CORPORATION, a corporation.

[fol. 2]

COMPLAINT—Filed March 27, 1959

I.

Plaintiff, Patrick A. McKenna, is a citizen of Washington, District of Columbia; Defendant, Floyd A. Wallis (hereinafter referred to as Wallis), is a citizen of the Parish of Orleans, State of Louisiana, and Defendant, Pan-American Petroleum Corporation (hereinafter referred to as Pan-American), is a private corporation organized and existing under the laws of the State of Delaware and qualified as a foreign corporation under the laws of the State of Louisiana, with an office in the City of New Orleans, State of Louisiana. The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand (\$10,000.00) Dollars.

II.

This action is brought under the Declaratory Judgment Act, 28 U.S.C.A., Sections 2201 and 2202, and there is an actual controversy among the parties.

III.

In January, 1954, the plaintiff and defendant, Wallis, commenced, and thereafter carried on, a joint venture for the acquisition of an oil and gas lease or leases covering certain lands in Plaquemines Parish, Louisiana. As a result of their joint efforts, defendant, Wallis, filed Acquired Lands Oil and Gas Lease Applications numbered BLM-A-037435, BLM A-037866, BLM-A-037437, BLM A-037438 and [fol. 3] BLM A-037439, covering in the aggregate 826.87 acres of land in Townships 24 and 25 South, Range 30 East, Louisiana Meridian, Plaquemines Parish, Louisiana. Thereafter, by letter agreement dated December 27, 1954, defendant, Wallis, acknowledged plaintiff's ownership of an undivided one-third ($\frac{1}{3}$) interest in the aforesaid oil and gas lease applications and simultaneously executed powers of attorney in favor of plaintiff concerning the aforesaid lease applications. The consideration for the interest acquired by the plaintiff in these lands was the work performed prior to that date by the plaintiff before the Bureau of Land Management, Department of the Interior, in ascertaining and checking the correct description of these lands pursuant to the joint venture agreement, payment by the plaintiff of one-half ($\frac{1}{2}$) of the filing fees and first year's rentals of these applications and payment then and thereafter of one-half ($\frac{1}{2}$) of attorneys' fees incurred in the prosecution of these applications before the Bureau of Land Management of the Department of the Interior and its sub-office, the Eastern States Land Office, and other work which will be shown during the course of the trial. (A photostatic copy of this letter agreement between the plaintiff and the defendant, Wallis, is annexed hereto and made part hereof as Exhibit "A".) This agreement, dated December 27, 1954, and accepted by plaintiff on January 3, 1955, was filed of record in the files of the Bureau of Land Management on February 3, 1955 at 2:49 P.M. There was [fol. 4] also filed in each of these files in the Bureau of Land Management a letter from Floyd A. Wallis, advising

the Director of the Bureau of Land Management of a written agreement between the plaintiff and the defendant, Wallis, indicating that the plaintiff was to receive an interest in the respective leases on issuance.

IV.

Plaintiff and defendant, Wallis, in the ensuing months after February 3, 1955, as in the year 1954, cooperated jointly in their venture to bring about the issuance of a lease or leases on the above described lands to defendant, Wallis. Since these joint efforts necessitated legal representations in behalf of plaintiff and defendant, Wallis, before the Bureau of Land Management, Department of the Interior, plaintiff and defendant, Wallis, retained Washington counsel to represent them before this agency. Plaintiff and defendant, Wallis, assumed and paid equally the costs of this legal representation in accordance with the understanding between these joint adventurers.

V.

In late 1955 and early 1956, as a result of research conducted by the plaintiff and Mr. Edelstein, the then attorney for the plaintiff and defendant, Wallis, and as a result of conferences with responsible officials of the Bureau of Land Management, in which conferences plaintiff participated, it was determined that a Public Lands Application should [fol. 5] be filed in Wallis' name with the Bureau of Land Management with most carefully prepared land descriptions, covering the same lands described in the Acquired Lands Application BLM A-037435, 037436, 037437, 037438 and 037439, to insure that a lease would be issued to defendant, Wallis, whether the said lands were determined to be Acquired Lands or Public Lands. After careful research had been conducted cooperatively by the plaintiff in Washington, a Public Lands Application was prepared and forwarded to Wallis for his signature. A copy of this Public Lands Application BLM 042017 was forwarded to

plaintiff by Mr. Edelstein, plaintiff's and defendant, Wallis' attorney, on March 8, 1956. Plaintiff continued to pay his fifty (50%) per cent share of legal fees for services performed by Mr. Edelstein for plaintiff and defendant, Wallis, in accordance with statements submitted by Mr. Edelstein through April 17, 1956, after which time no further statements of fees for legal services were submitted to plaintiff.

VI.

Defendant, Wallis, on April 23, 1956, advised the plaintiff that he was revoking powers of attorney previously given to the plaintiff to represent his interest in connection with the Acquired Lands Applications before the Bureau of Land Management, and defendant, Wallis, so advised the Director of the Bureau of Land Management in letters dated April 23, 1956. By letter dated May 4, 1956, defendant, Wallis, advised plaintiff that he, Wallis, did not [fol. 6] recognize the agreement, dated December 27, 1954, pursuant to which plaintiff acquired an undivided one-third ($\frac{1}{3}$) interest in certain Federal Oil and Gas Lease Applications. This letter was written after a meeting in New Orleans between plaintiff and defendant, Wallis, during the week-end of April 20, 1956, at which meeting defendant, Wallis, attempted unsuccessfully to induce plaintiff to reduce his interest in the pending lease applications. Defendant, Wallis, through Harry M. Edelstein, Esq., by letter dated July 30, 1956 to the Director of the Bureau of Land Management, denied that the plaintiff (his joint adventurer in this enterprise to obtain the issuance of a lease or leases covering this acreage in Townships 24 and 25 South, Range 30 East, Louisiana Meridian, Plaquemines Parish, Louisiana) has an undivided one-third ($\frac{1}{3}$) interest in the Public Lands Oil and Gas Lease Application BLM 042017 but avers that plaintiff's interest is limited to Acquired Lands Applications BLM A-037435 through BLM A-037439.

VII.

On December 18, 1958, effective as of January 1, 1959, the Secretary of the Interior issued a Public Lands Oil and Gas Lease to defendant, Wallis, pursuant to Public Lands Application BLM 042017 covering the lands referred to in Article III hereof. Plaintiff has made demand on defendant, Wallis, to assign to plaintiff his one-third ($\frac{1}{3}$) interest in said lease but defendant, Wallis, has ignored plaintiff's demand.

[fol. 7]

VIII.

Defendant, Wallis, while still on agreeable terms with his joint adventurer, the plaintiff, advised plaintiff on February 8, 1955, by letter, that he was negotiating with defendant, Pan-American (then known as Stanolind Oil and Gas Company) for a trade concerning the then existing Acquired Lands Applications described in Article III above, but that he had reached no agreement with the defendant, Pan-American. Defendant, Wallis, advised plaintiff on March 8, 1955 that the defendant, Pan-American had offered him a consideration of One Hundred (\$100.00) Dollars per acre, plus a twenty-five (25%) per cent overriding royalty covering the 826.87 acres of land in the Acquired Lands Applications BLM A-037435, BLM A-037436, BLM A-037437, BLM A-037438 and BLM A-037439. Defendant, Wallis, further advised the plaintiff on March 29, 1955 that he had not made a deal with the defendant, Pan-American. The plaintiff has recently received a copy of an option agreement between the defendant, Wallis, and the defendant, Pan-American (then known as Stanolind Oil and Gas Company), dated March 3, 1955, by which defendant, Wallis, granted to defendant, Pan-American, the right and option, at defendant, Pan-American's election, to acquire any and all oil and gas leases which may be issued to defendant, Wallis, his heirs and assigns, under and by virtue of the Acquired Lands Applications BLM

A-037435 through BLM A-037439. The consideration to Wallis for these rights was Eight Thousand Three Hundred (\$8,300.00) Dollars in cash, plus a one-eighth ($\frac{1}{8}$) [fol. 8] overriding royalty which, at the election of defendant, Wallis, could be paid in one of the following methods:

- (a) Ninety Dollars (\$90.00) per acre for each acre covered by the leases assigned; or
- (b) the reservation in Wallis of a production payment in the amount of Ninety Dollars (\$90.00) per acre for each acre covered by the leases assigned, payable out of one-thirty-second of eight-eighths ($\frac{1}{32}$ of $\frac{8}{8}$); or
- (c) a combination of cash consideration and production payments out of one-thirty-second of eight-eighths ($\frac{1}{32}$ of $\frac{8}{8}$) at the election by Wallis, which shall total ninety Dollars (\$90.00) per acre for each acre covered by the leases assigned.

A copy of this option agreement has been recorded in the conveyance records of the Parish of Plaquemines (C.O.B. No. 212, Fol. 359) on January 16, 1959. Plaintiff avers that the aforesaid option does not affect his undivided one-third ($\frac{1}{3}$) interest in Public Lands Lease BLM 042017, which has issued to defendant, Wallis, and defendant, Pan-American avers that its option does affect plaintiff's undivided interest in said lease.

IX.

Plaintiff avers that he has a one-third ($\frac{1}{3}$) interest in Public Lands Lease BLM 042017 issued to defendant, [fol. 9] Wallis, his joint adventurer, by the Secretary of the Interior on December 18, 1958, effective as of January 1, 1959, and that the defendant, Wallis, has failed and refused to formalize by assignment plaintiff's undivided one-third ($\frac{1}{3}$) interest in these leases. Plaintiff avers that the

option given by the defendant, Wallis, to the defendant, Pan-American, was executed without his knowledge and consent and further that defendant, Wallis, withheld from plaintiff knowledge that this option agreement had been executed by defendant, Wallis. Plaintiff avers that defendant, Wallis, did, in fact, advise him that negotiations with defendant, Pan-American, looking to the consummation of an option agreement similar to the existing one but with better terms, had reached a stalemate and had been broken off. Plaintiff contends that by virtue of the contrary contentions concerning the plaintiff's interest in Federal Lease BLM 042017, as a result of the agreement between plaintiff and defendant, Wallis, dated December 27, 1954, an actual and bona fide controversy exists between the plaintiff and the defendant, Wallis, as to whether or not the plaintiff has an undivided one-third ($\frac{1}{3}$) interest in Public Lands Lease BLM 042017 covering the lands comprising 826.87 acres in Townships 24 and 25 South, Range 30 East, Louisiana Meridian, Plaquemines Parish, Louisiana, and the rights of plaintiff and defendant, Wallis, under the aforesaid agreement, dated December 27, 1954, can be determined only by declaratory judgment. Likewise, an actual and existing and bona fide controversy exists between the [fol. 10] plaintiff and the defendant, Pan-American, as to whether or not Pan-American's option affects plaintiff's undivided interest in Public Lands Lease BLM 042017.

Wherefore, plaintiff, Patrick A. McKenna, prays for a declaratory judgment declaring that he has an undivided one-third ($\frac{1}{3}$) interest in Federal Oil and Gas Lease BLM 042017, issued to defendant, Floyd A. Wallis, by the Secretary of the Interior on December 18, 1958, effective as of January 1, 1959.

Plaintiff prays further for a declaratory judgment determining his rights and the rights of the defendant, Pan-American, under the option agreement entered into between the defendant, Wallis, and the defendant, Pan-American, on March 3, 1955.

Plaintiff further prays for such other and further relief as to this court may seem just and proper, in addition to the costs and disbursements of this action.

Philip R. Collins, MacCracken, Collins & Whitney,
One Thousand Connecticut Avenue, Washington,
D. C.;

Edmond G. Miranne, Richards Building, New Orleans 12, Louisiana;

Attorneys for Plaintiff.

Lee C. Grevemberg, Richards Building, New Orleans 12, Louisiana, Of Counsel.

[fol. 10a]

EXHIBIT A TO COMPLAINT

FLOYD A. WALLIS
OIL LEASES-ROYALTIES
CARONDELET BUILDING
NEW ORLEANS 12, LA.

CANAL 8706

Dec. 27, 1954

Mr. Patrick McKenna
One Scott Circle
Washington, D. C.

RE: BLM-A-037435; 037436; 037437;
037438; 037439
SOUTHWEST PASS APPLICATIONS

Dear Mr. McKenna:

The above captioned serialized numbers represent numbers assigned to oil and gas lease applications made by me to the Bureau of Land Management, Department of Interior, covering certain lands in Plaquemines Parish, Louisiana. These applications were filed on June 2, 1954.

This letter is written to confirm the fact that you have a $\frac{1}{3}$ undivided interest in the above captioned oil and gas lease applications and that your $\frac{1}{3}$ interest, of course, covers such lease or leases as may be issued to me under these captioned applications, it being understood, however, that all dealings in connection with these leases shall be at my sole discretion and direction.

If this correctly represents our understanding in this matter, I will appreciate if you will sign the copy of this letter in the place provided in the lower left corner and return same to me so that I may complete my file herein.

With kindest regards, I remain

Yours sincerely,

/s/ FLOYD A. WALLIS
Floyd A. Wallis

FAW:bb

APPROVED:

/s/ P. A. McKENNA 1-3-55.
P. A. McKENNA

[fol. 11]

IN UNITED STATES DISTRICT COURT

ANSWER OF FLOYD A. WALLIS—Filed May 15, 1959

Now comes Floyd A. Wallis, defendant, and in response to the complaint filed herein by Patrick A. McKenna, shows:

1.

The allegations of the complaint do not state a claim upon which any relief may be granted; and, therefore, this suit should be dismissed.

2.

Categorically answering the allegations of the complaint, this defendant avers:

(a) The allegations of Paragraphs I, II and VII, are admitted; except that plaintiff does not have a one-third interest in this defendant's lease that was issued under Public Domain Lands Application BLM-042017.

(b) The allegations, inferences and conclusions stated in Paragraphs III, IV, V, VI and IX are denied, except as may be hereinafter otherwise specifically admitted.

(c) With respect to Paragraph VIII, this respondent admits the execution of the option agreement referred to therein, but denies that said option agreement covers the lease issued under Public Lands Application BLM-042017 and would show that at the time that this defendant entered into the said option agreement, this defendant had no obligation whatever to plaintiff, the said plaintiff had no right to be consulted in the matter, and that whatever, [fol. 12] if any, right plaintiff may have had in the \$8300.00 in cash that was paid in consideration therefor was subject to a final accounting between plaintiff and this defendant.

3.

Further answering said complaint, this defendant would show that prior to January, 1954, he discovered the existence of the 826.87 acres of land in Township 24 and 25 South, Range 30 East, Louisiana Meridian, Parish of Plaquemines, Louisiana, which are referred to in Article III of plaintiff's complaint; that this defendant decided to apply for a mineral lease on the said property in accordance with the Federal Mineral Leasing Act; and that in connection therewith this defendant, on or about March 18, 1954, sought the assistance of plaintiff herein in view of the fact that plaintiff had represented to this defendant that he, plaintiff (1) was fully capable of handling, and qualified to handle, any and all matters that might become involved before the Department of the Interior of the United States of America; (2) was a qualified lawyer having been admitted to the Bar of the State of Oklahoma

and (3) was also qualified to handle litigation in the United States courts, including the United States District Court in the District of Columbia, and all Federal appellate courts before which this matter might be litigated.

4.

This defendant denies that he ever entered into a "joint [fol. 13] venture" with plaintiff for the acquisition of one or more mineral leases on the lands above described.

5.

On the date aforementioned, March 18, 1954, this defendant agreed that if plaintiff would pay $\frac{1}{2}$ of the filing fees on the applications mentioned in the next succeeding paragraph, and would also pay miscellaneous expenses that would accrue in Washington, D. C. in connection with said applications and the prosecution thereof, and would furnish all of the legal and other services that were and would be required in filing and prosecuting said applications in the Department of the Interior of the United States and before the United States District Court for the District of Columbia, as well as any and all Federal appellate courts before which this matter might be litigated, including the resistance of any adverse claims that might be asserted against the property and the said applications, this respondent would give plaintiff a $\frac{1}{3}$ interest under any lease or leases which he might acquire under, but only under, the Acquired Lands oil and gas lease applications referred to in the next succeeding paragraph.

6.

This defendant admits that he filed *Acquired Lands Oil and Gas Lease Applications*, numbered BLM A-037435, BLM A-037436, BLM A-037437, BLM A-037438, and BLM A-037439 covering the property hereinabove described. However, this respondent would show that the plaintiff

[fol. 14] performed very little, if any, services in connection with the preparation of said applications, which services were limited to the furnishing of this defendant with information that he requested from time to time, in filing, although belatedly, the said applications after they had been prepared by this defendant without any appreciable assistance from the plaintiff and in keeping this defendant informed, from time to time of certain, if not all, developments.

7.

This defendant had become apprehensive about the inability of the plaintiff to perform the services that he had agreed to perform when the plaintiff delayed the filing of this defendant's said applications from the latter part of March until June 2, 1954, when said applications were actually filed and the plaintiff was unable to give a reasonable excuse for not timely filing said applications.

8.

After filing said applications, and although this defendant was relying upon the plaintiff to guide him in complying with all legal requirements, it was not until on or about August 14, 1954 that plaintiff informed this defendant for the first time that he had to make certain written declarations showing the extent of this defendant's other interests, if any, in other leases on property within the State of Louisiana; and plaintiff's failure to have originally given this defendant this advice further shook this [fol. 15] defendant's confidence in plaintiff.

9.

Notwithstanding his agreement, on March 18, 1954, to pay $\frac{1}{2}$ of the aforementioned filing fee, the plaintiff did not actually reimburse this defendant therefor until on or about January 3, 1955.

10.

On or about December 8, 1954, this defendant discovered for the first time that descriptions (contained in an adverse filing in the Department of the Interior) that had been furnished by the plaintiff in May, 1954, were erroneous and the erroneous descriptions had caused this defendant considerable apprehension, delay and expense in trying to analyze the position of this defendant's adversaries.

11.

On December 20, 1954, the California Company obtained a slant well permit without any opposition from the plaintiff or this defendant; that if the plaintiff had performed the services which this defendant had a right to expect of him, timely opposition to the application for said permit might have been made; and that because of the plaintiff's neglect and delay, it was necessary to move to set aside the permit and to obtain the services of another attorney in an effort to do so, all without any success.

[fol. 16]

12.

Despite the plaintiff's actions, as aforesaid, this defendant executed the letter of December 27, 1954 (annexed to the complaint herein) still believing that plaintiff was qualified to handle, and would handle, at no expense to this defendant, all of the matters that might arise before the Department of the Interior and in the U.S. courts in connection with said applications.

However, as soon as the said letter of December 27, 1954, was signed by the defendant and accepted by plaintiff, plaintiff then recommended that one Martin White, an attorney of Washington, D.C., should be employed to handle the said applications before the Department of the Interior, and all matters pertaining thereto. Whereupon, the plaintiff admitted, for the first time, that he was wholly incapable of properly handling said matters.

13.

This defendant first objected to the employment of any other attorney, knowing that the plaintiff had agreed to furnish all said services and had represented himself as being fully capable of doing so. However, when plaintiff stated that Mastin White's services would not cost any more than \$500.00 in connection with one specific phase of the work, this defendant reluctantly agreed to the employment of Mastin White and, in connection therewith, agreed to pay $\frac{1}{2}$ of his fees, but only on the condition that plaintiff reduce the $\frac{1}{3}$ interest mentioned in the aforesaid letter [fol. 17] of December 27, 1954, and, plaintiff agreed to a reduction, although the specific amount was not actually agreed upon. Finally, when plaintiff refused to make any reduction whatever in the said interest, this defendant refused to pay Mastin White's fees and this defendant is informed that plaintiff actually paid them.

14.

Mastin White finally withdrew from the proceedings before the Department of the Interior of the United States in the latter part of October, or early part of November, 1955; and upon his withdrawing and because of the inadequacies of plaintiff, the need for other counsel was urgent, due, in part to the filing, at about that time, of a slant well application by the Shell Oil Corporation. Whereupon, this defendant went to Washington, D.C. during November, 1955, and, upon the recommendation of plaintiff employed one Harry Edelstein, but before doing so, this defendant advised plaintiff that a new arrangement would be necessary because this defendant could ill afford to give plaintiff what is called for in the letter of December 27, 1954. Whereupon, it was agreed between plaintiff and this defendant that each would advance $\frac{1}{2}$ of the fees which would be payable to Harry Edelstein from time to time, but that plaintiff and this defendant would rearrange the agreement that existed at that time between them.

15.

Plaintiff came to the city of New Orleans in April, 1956, [fol. 18] ostensibly for the purpose of rearranging the agreement that then existed between plaintiff and this defendant, and presumably pursuant to the agreement mentioned in the last preceding paragraph.

However, the plaintiff refused to make an adjustment in the prevailing agreement, although plaintiff admitted that he had not performed his part of the agreement in accordance with the understanding that had been reached and the representations that had been made to this defendant.

16.

This defendant admits that on April 23, 1956, following this defendant's ascertainment of the complete falsity of all of the representations made to this defendant by plaintiff, particularly those representations that are set forth in Paragraph 3 above, this defendant revoked the powers of attorney previously given to the plaintiff and on May 4, 1956 terminated all and whatever relationship this defendant had with the plaintiff, a copy of the letter of revocation dated April 23, 1956 and of the letter of termination dated May 4, 1956 being hereto attached and made part hereof as fully as though copied in extenso.

(a) This respondent would show that all of the factual statements contained in his said letter of May 4, 1956 to plaintiff are true and correct and fully justified the cancellation of this defendant's prior arrangement with the plaintiff; and that as a result of the said letter and the [fol. 19] facts therein stated, the plaintiff does not have the right to an undivided one-third ($\frac{1}{3}$) interest in (a) the Federal Oil & Gas Lease Applications described in the Letter Agreement dated December 27, 1954, or (b) the Public Lands Application BLM-042017; and that the only right that the plaintiff has is on a quantum meruit basis assuming, but not admitting, that he performed services for this defendant.

17.

While this defendant admits the execution of the letter of December 27, 1954, he would show that at the time that he executed the said document, he was relying upon the abovementioned representations that had been made by the plaintiff and, in view of the fact that there was every reason to anticipate a serious contest in the Department of the Interior of said lease applications, as well as litigation in the United States courts, this defendant was led to believe by plaintiff and believed that in consideration for the said one-third ($\frac{1}{3}$) interest, the plaintiff would handle any and all matters that might arise in the said department and/or in the said courts with reference to and in connection with said applications, all without the necessity of securing any outside assistance, and on further condition that plaintiff pay one-half of the filing fees due to the Department of the Interior and of the miscellaneous expense items that would accrue, from time to time, in Washington D. C.

This defendant, vehemently denies that he gave, agreed [fol. 20] to give, or would have given plaintiff a one-third ($\frac{1}{3}$) interest in the said lease applications for "ascertaining and checking the correct description" of the lands involved and for plaintiff's alleged agreement to pay one-half ($\frac{1}{2}$) of the filing fees and the first year's rental and thereafter, one-half ($\frac{1}{2}$) of the attorney's fees incurred in the prosecution of said applications before the Department of the Interior, etc., as alleged.

(a) This defendant would show that there never was any understanding or agreement from the inception with respect to the payment of costs and fees, except as hereinabove set forth; that the plaintiff did not ascertain the correct description of the lands involved, was incapable of ascertaining such descriptions although he led this defendant to believe that he was fully capable of doing so and that this respondent, himself, secured the correct descrip-

tions by employing a competent engineer who, with the aid of the records that were available to him on file with the United States Engineers in New Orleans, prepared said descriptions, all without any help from the plaintiff.

(b) There was likewise no agreement or understanding from the inception with respect to the payment of attorney's fees; and this respondent would show that from the inception, the plaintiff obligated himself to perform all such services, and there were to be no attorneys' fees payable by this respondent inasmuch as the one-third ($\frac{1}{3}$) interest mentioned in the letter of December 27, 1954, was partly, and mainly, in consideration for such services which [fol. 21] the plaintiff represented himself as being able and willing to render.

18.

This defendant denies that the plaintiff had anything whatever to do with this defendant's filing of the *Public Lands* Application, more particularly identified as Public Lands Application BLM-042017; and this defendant would show that the plaintiff has no agreement, written or otherwise, under which he is entitled to receive under the letter agreement of December 27, 1954, or otherwise, any interest in any lease or leases issued in connection with the said application. In this connection, this defendant would specifically show that the lease which he holds was issued under, and solely under, his said Public Lands Application BLM-042017; that said lease is subject to the provisions of La. R.S. 9:1105 which is specially and specifically pleaded; and that the plaintiff has no right to prove any title to or interest in said lease by oral statements and/or oral evidence, and this defendant, therefore, specifically pleads the above statute, and the jurisprudence of the Louisiana Supreme Court interpreting said statute, in bar of plaintiff's attempt to prove any title to or interest in said lease.

19.

This respondent would further show that the plaintiff does not have, and this Honorable Court may not recognize in plaintiff, rights in this respondent's lease, for the further [fol. 22] reason that the plaintiff does not hold from this respondent an assignment or transfer that conforms to the requirements of 30 U.S. Code 187(a), and of 43 C.F.R. 192.140, 192.141 and 192.142. These statutory provisions and the regulations of the Department of the Interior of the United States, with respect thereto, are hereby specifically pleaded against plaintiff's alleged rights.

20.

This defendant denies that there ever existed a joint venture between him and plaintiff; and this defendant would show that the only relationship that ever existed between this defendant and plaintiff was that of attorney and client and/or employer and employee in that this defendant engaged plaintiff's services to handle this defendant's case in the Department of the Interior of the United States and before the Federal Courts, if court litigation should ensue, all as hereinabove set forth.

21.

The alleged agreement between this defendant and the Pan-American Petroleum Corporation does not pertain to the lease that this respondent now holds under Public Lands Application BLM-042017; and that the letter agreement of December 27, 1954 likewise does not pertain to said Public Lands Lease Application.

Alternative Plea

In the alternative, and only in the event that this Honorable Court should hold that plaintiff is entitled to a one-third ($\frac{1}{3}$) interest in the lease issued under Public

[fol. 23] Lands Lease Application BLM-042017 (which is denied) then, and in such event, this defendant would show that he has thus far expended, the full sum of \$40,173.61 in prosecuting the said matter, the same being itemized as follows:

Net fees paid Harry M. Edelstein from Jan. 1956 through April 30, 1959	\$32,846.50
Amount paid B.M. Dornblatt and Associates, Inc. for engineering services	525.00
Amount paid F.C. Gandolfo, Surveyor	3,704.75
Amount paid Southern Blue Print Company	319.88
Amount paid Rogers & Seglund, Geologists	1,268.27
Amount paid F. & A. Map Co.	208.64
Net amount paid Department of the Interior of the U.S. over and above 1/2 paid by plaintiff and special costs in connection with the preparation of applications	1,300.58
	<hr/>
	\$40,173.61

and this defendant is, therefore, entitled to reimbursement from the plaintiff for one-half (1/2) thereof, or the full sum of \$20,086.80, with interest at 5% per annum from the respective disbursement dates of said items, until paid.

Wherefore, this defendant, Floyd A. Wallis, prays that the plaintiff's suit be dismissed at his cost; and in the alternative this defendant would show that if the court [fol. 24] should hold that plaintiff is entitled to participate

in the lease issued under said Public Lands Lease Application BLM-042017, then this defendant is entitled to a judgment against the plaintiff for the sum of \$20,086.80, with 5% interest as recited above.

And for such other and further relief as to this court may seem just and proper.

C. Ellis Henican, Attorney for Respondent, 1112
Hibernia Bldg., New Orleans 12, La.

Of Counsel: Henican, James & Cleveland.

IN UNITED STATES DISTRICT COURT

ANSWER OF PAN-AMERICAN PETROLEUM CORPORATION—
Filed June 1, 1959

Defendant, Pan American Petroleum Corporation, in response to the complaint filed herein by Patrick A. McKenna, says:

I.

This defendant admits the allegations of Paragraph 1 of the complaint.

II.

The allegations of Paragraph 2 are admitted.

III.

This defendant is without knowledge of the true facts affecting the controversy between McKenna and Wallis [fol. 25] and, therefore, the allegations of Paragraph 3 are denied except that this defendant admits that the purported letter agreement dated December 27, 1954 which is made part of the Complaint as Exhibit "A" was executed by the parties thereto but denies that said agreement

created or could have created any rights which McKenna claims would or could affect this defendant.

IV.

For lack of sufficient information to justify a belief this defendant denies the allegations of Paragraph 4.

V.

For lack of sufficient information to justify a belief this defendant denies the allegations of Paragraph 5.

VI.

For lack of sufficient information to justify a belief this defendant denies the allegations of Paragraph 6.

VII.

This defendant admits the allegations of Paragraph 7 but denies that McKenna has any rights in and to Public Lands Application BLM 042017 which could affect this defendant.

VIII.

This defendant admits the execution of the Option Agreement with Wallis dated March 3, 1955 and admits that said Option Agreement covers the lease issued under Public Lands Application BLM 042017, but denies that McKenna's rights, if any he has, might or could affect this defendant's right under the Option Agreement of March 3, 1955 with [fol. 26] Wallis to acquire all the right, title and interest of Wallis in and to Public Lands Lease BLM 042017, for the consideration expressed in said agreement of March 3, 1955.

IX.

For lack of sufficient information to justify a belief this defendant denies all the allegations of Paragraph 9 except

that McKenna knew Wallis was negotiating with this defendant looking to the consummation of an option agreement which in fact was executed between this defendant and Wallis on March 3, 1955 as aforesaid.

X.

Further answering said complaint, this defendant avers that on the face of the letter agreement of December 27, 1954 between Wallis and McKenna, the defendant Wallis clearly and unequivocally reserved the right unto himself to make all dealings in connection with any lease affected by the letter agreement of December 27, 1954 at his sole discretion and direction, and Wallis was under no obligation whatsoever to McKenna to consult McKenna with respect to the execution of the Option Agreement with Pan American dated March 3, 1955, and this defendant further avers that any rights which McKenna has or may have under the said agreement of December 27, 1954 are limited and restricted to a one-third ($\frac{1}{3}$) undivided interest in whatever residual rights Wallis has or may have upon [fol. 27] and after his assignment to this defendant of Public Lands Lease BLM 042017 pursuant to the Option Agreement of March 3, 1955.

XI.

Alternatively, this defendant would show that although McKenna in Paragraph 9 of his complaint had judicially admitted "that defendant, Wallis, did, in fact advise him (McKenna) that negotiations with defendant, Pan American, looking to the consummation of an option agreement similar to the existing one but with better terms, had reached a stalemate and had been broken off" McKenna did not notify this defendant, nor did this defendant know of the existence of the purported agreement of December 27, 1954 and this defendant would show that Wallis represented to this defendant contemporaneously with the

execution of the Option Agreement of March 3, 1955 that Wallis was the sole owner of any and all rights affecting the pending lease applications and therefore McKenna having permitted Wallis to negotiate with this defendant "looking to the consummation of an option agreement" and this defendant having relied on the apparent right and authority of Wallis to negotiate the said option agreement of March 3, 1955 McKenna is forever estopped from denying the right and authority of Wallis to execute said agreement of October 3, 1955 with this defendant.

XII.

This defendant shows that Wallis has refused to perform his obligations under the Option Agreement of March [fol. 28] 3, 1955 to assign, transfer and deliver to this defendant all the right, title and interest of Wallis in and to Public Lands Lease BLM 042017 and heretofore this defendant has filed a civil action against Wallis under the number 8937 of the docket of this court for specific performance of the said Option Agreement of March 3, 1955, said suit being still pending and by reference is made part hereof.

Wherefore, defendant, Pan American Petroleum Corporation, prays that the plaintiff's suit be dismissed at his cost, and, in the alternative, that if the court should hold that plaintiff has any rights under the purported agreement dated December 27, 1954 or otherwise, then, that any such rights do not affect in any manner whatsoever the rights of Pan American Petroleum Corporation under the Option Agreement dated March 3, 1955 but are limited and restricted to participation by McKenna in any residual rights which Wallis has or may have under said Option Agreement of March 3, 1955, and defendant further prays that said Option Agreement of March 3, 1955 be recognized and enforced with respect to Public Lands Lease BLM 042017 as prayed for in the pending action by Pan American Petroleum Corporation against Wallis under the number 8937 of the docket of this court.

This defendant further prays for such other and further relief as in law and equity this court may deem just and proper.

Percy Sandel, William P. Hardeman, Cobb & Wright,
By Lloyd J. Cobb, Attorneys for Defendant, Pan
American Petroleum Corporation.

[fol. 153]

IN UNITED STATES DISTRICT COURT

AMENDED ANSWER OF FLOYD A. WALLIS—Filed
February 1, 1961

Comes Now, Floyd A. Wallis, defendant in the above numbered and styled Civil Action No. 8904, and subject to leave of court amends his answer, as heretofore filed therein, in the following particulars, to-wit:

21.

In Article III of the complaint, plaintiff alleges upon a letter agreement dated December 27, 1954, same being annexed to the complaint and marked "Exhibit A", and defendant shows that this agreement provided in part with reference to such lease or leases as may be issued to Wallis "that all dealings in connection with these leases shall be at my sole discretion and direction." Despite the foregoing, [fol. 154] and without this defendant's knowledge and consent, defendant shows that plaintiffs did by instrument dated May 1, 1956, enter into a contract and agreement with one Samuel Nakasian, which contract and agreement represented that plaintiff "owns a one-third undivided interest in lands covered by applications for mineral leases," then referring to the Acquired Lands Oil and Gas Lease Applications referred to in Article III of the complaint. Said agreement further provided that plaintiff "does hereby grant and convey to (Nakasian) fifteen per cent (15%) of his one-third interest, equal to but not less than five per cent (5%) undivided share in all title, rights and interest in the

above-described lands, so that henceforth, (Nakasian) is secure in his possession and right to a five per cent (5%) undivided share in any and all rights, title and interest to the minerals on the above-described lands as, if and when acquired by" (plaintiff). This defendant shows that to the extent that this plaintiff has a claim to the lease, BLM-042017, if any, (which is denied) then this defendant shows that the conveyance executed by the said plaintiff in favor of Nakasian constituted a breach and violation of the terms and provisions of any agreement between this defendant and said plaintiff, and, without limiting the generality hereof, particularly the clause hereinabove quoted from the letter agreement of December 27, 1954, and defendant shows that plaintiff, having breached the agreement at that time and as a result thereof he being in default, is thereby [fol. 155] prevented and precluded from prosecuting this action, and particularly, he having breached the agreement, he cannot now maintain an action based upon said agreement.

22.

Since having filed his answer herein, this defendant's deposition has been taken and, in preparation therefor, this defendant had occasion to review his file and other related documents in connection with this litigation, and finds that the letter dated May 4th, 1956, which is referred to in Article 16 of his answer and which letter was made a part thereof, contained certain erroneous statements, and accordingly this defendant desires to amend Article 16 of his complaint, by deleting therefrom said letter of May 4th, 1956, and thus amend this Article of his complaint to read as follows:

"16.

"This defendant admits that on April 23rd, 1956, following this defendant's ascertainment of the complete falsity of all of the representations made to this defendant by plaintiff, particularly those representations

that are set forth in Paragraph 3 above, this defendant revoked the powers of attorney previously given to the plaintiff and, under letter of the same date addressed to plaintiff, so advised plaintiff of his action, and, following the conference referred to in Paragraph 15, defendant by letter dated May 4th, 1956, terminated [fol. 156] all and whatever relationship this defendant had with the plaintiff, a copy of the letter of revocation of the powers of attorney, dated April 23rd, 1956, being hereto attached and made a part hereof as fully as though copied in extenso.

(a) This respondent would show that certain of the factual statements contained in his said letter of May 4th, 1956, to plaintiff are true and correct and fully justified the cancellation of this defendant's prior arrangement with the plaintiff; and that as a result of the said letter and certain of the facts therein stated, plaintiff does not have the right to an undivided one-third interest in (a) the Federal Oil and Gas Lease Applications described in the letter agreement dated December 27th, 1954, or (b) the Public Lands Application BLM-042017; that the only right that the plaintiff has is on a quantum meruit basis, assuming, but not admitting, that he performed services for this defendant."

23.

Since the filing of this suit, Floyd A. Wallis has had additional costs and expenses and, therefore, wishes to amend his original alternative plea which follows Paragraph 21 of his original responsive pleadings filed in Civil Action No. 8904, so that henceforth said alternative plea shall read as follows:

[fol. 157]

Alternative Plea

In the alternative, and only in the event that this Honorable Court should hold that plaintiff is entitled to a one-

third interest in the lease issued under Public Lands Lease Application BLM-042017 (which is denied), then, in such event, this defendant would show that he has now expended \$69,022.25 in prosecuting the said matter, the same being itemized as follows:

Travel expenses incurred in the years 1955, 1959 and 1960	\$ 1,382.31
Telephone expense, including long distance calls accrued during 1954 through October 31, 1960	2,139.42
Net fees paid Harry M. Edelstein, Attorney, Washington, D. C., from January 19, 1956 thru October 31, 1960	48,660.07
Amount paid for professional services includ- ing engineering, surveying and geology, the amounts having accrued in 1954, 1956, 1957, 1958 and 1960	11,780.17
Cost of obtaining reproduction of documents, including electrical logs, etc.	975.94
Miscellaneous expenses incurred in 1954, 1955, 1956, 1958 and 1959	4,084.34

and, Floyd A. Wallis is, therefore, entitled to reimbursement from Patrick A. McKenna for one-half thereof, or the full sum of\$34,511.12, with interest at 5% per annum from the respective disbursement dates of said items, until paid. Defendant, Floyd A. Wallis, attaches hereto and makes part hereof for con-[fol. 158] sideration as fully as though copied herein in extenso, complete detailed itemized statements in support of the expenditures herein above set forth.

Moreover, in order to properly protect the lease issued under Public Lands Lease Application BLM-042017, and particularly in connection with the efforts by the Shell Oil

Company and The California Company, and others, to set aside the said lease and the efforts of the State of Louisiana, with the cooperation of its mineral lessees, to claim title to the property covered by the said lease and thereby render this defendant's said lease null and void and ineffective and in connection with the protection of the leased premises against drainage, this defendant has engaged the professional services of Colles C. Stowell, Geologist, Henican, James & Cleveland and C. Ellis Henican, Attorneys at Law; that said parties have performed, are performing, and will continue to perform, extensive services in connection with the protection of said lease; that this defendant has already obligated himself to pay said parties their fees well in excess of \$50,000.00; that the services and fees are indispensable to the protection of this defendant's said lease and the property that is the subject thereof; and that if Patrick A. McKenna is successful in his effort to be recognized as the owner of an undivided one-third interest in the said lease, he should be further required to reimburse this defendant for one-half of the total fees that are, and will be, payable to Colles C. Stowell, Henican, James & Cleveland and C. Ellis Henican.

[fol. 159]

24.

Floyd A. Wallis, defendant, amends the prayer of his original responsive pleadings so that, as amended, said prayer will henceforth read as follows:

Wherefore, this defendant, Floyd A. Wallis, prays that the suit of Patrick A. McKenna (Civil Action No. 8904) be dismissed at his cost; and, in the alternative, Floyd A. Wallis, this defendant, would show that if the court should hold that Patrick A. McKenna is entitled to participate in the lease issued under said Public Lands Lease Application BLM-042017 to the extent of an undivided one-third thereof, or therein, then this defendant, Floyd A. Wallis, is entitled to a judgment against Patrick A. McKenna, for the sum of \$34,511.12, with 5% interest as recited above; that Floyd A.

Wallis is further entitled to a judgment against plaintiff for one-half of the full fees that are, and will be, payable to Colles C. Stowell, Henican, James & Cleveland and C. Ellis Henican, as hereinabove set forth; and that Floyd A. Wallis is further entitled to a judgment against Patrick A. McKenna for one-half of all of the fees, costs and expenses that may be incurred by him from and after October 31, 1960, which said costs, expenses and fees will be inevitable in the prosecution and defense by Floyd A. Wallis of the lease and property.

And for such other and further relief as to this court may seem just and proper.

Wherefore, this defendant, Floyd A. Wallis, prays that [fol. 160] this amended answer be allowed, and that there be judgment herein in his favor as prayed for in his original answer, as amended.

Horace M. Holder, 1300 Beck Bldg., Shreveport,
Louisiana;

C. Ellis Henican, 1112 Hibernia Bldg., New Orleans,
La.;

By: C. Ellis Henican,
Attorneys for Floyd A. Wallis.

[fol. 189]

IN UNITED STATES DISTRICT COURT

ORDER THAT NO PAROL EVIDENCE SHALL BE ADMITTED IN C.A. #8904 TO ESTABLISH PLAINTIFF'S INTEREST IN THE REAL PROPERTY; ORDER THAT PAROL EVIDENCE MAY BE ADMITTED IN BOTH CONSOLIDATED ACTIONS TO SHOW WHETHER THE INTEREST CONVEYED ATTACHES TO THE LEASE GRANTED, ETC.; AND ORDER THAT NO PAROL EVIDENCE SHALL BE ADMITTED IN C.A. #8937 TO PROVE PLAINTIFF'S EXERCISE OF ITS OPTION—July 20, 1961

Wright, J:

It appearing that questions relating to the admissibility of parol evidence would arise on the trial of these cases, the court ordered the parties to file briefs covering these questions before the trial. Having considered the trial [fol. 190] briefs filed, the court is now ready to rule.

1. It Is Ordered that no parol evidence shall be admitted in Civil Action No. 8904 to establish plaintiff's interest in the real property, whether by way of joint venture or otherwise.

2. It Is Further Ordered that parol evidence may be admitted in both consolidated actions to show whether the interest conveyed, if any, by the written agreements, attaches to the lease granted under the public domain lands application filed with the Department of the Interior.

3. It Is Further Ordered that no parol evidence shall be admitted in Civil Action No. 8937 to prove plaintiff's exercise of its option under the agreement of March 3, 1955.

J. S. W.

Authorities

1. La. C.C., Art. 2275; *Slack v. DeSoto Properties*, 221 La. 384, 59 So.2d 428, 431-432.

2. La. C.C., Arts. 1949, 1956; *Plaquemines Oil & Development Co. v. State*, 208 La. 425, 23 So.2d 171, 174; *Gulf*

Refining Co. v. Garrett, 209 La. 674, 25 So.2d 329, 338-339 (on rehearing); *Simmons v. Hanson*, 228 La. 440, 82 So.2d 757, 758-759; *Rosenthal v. Gautier*, 224 La. 341, 69 So.2d 367, 369.

3. La. C.C., Art. 2462; *Barchus v. Johnson*, 151 La. 985, 92 So. 566; *Louisiana State Board of Education v. Lindsay*, 227 La. 553, 79 So.2d 879, 885; *McVay v. Swift*, 5 Cir., 91 F.2d 208, 209.

The rulings announced in the first and third paragraphs [fol.191] of the order are predicated on the consistent holding of the Louisiana Supreme Court that, for the purpose of the statute of frauds, La. C.C., Arts. 2275, 2440, 2462, the provisions of La. R.S. 9:1105 require that "oil and gas and other mineral leases, and contracts applying to and affecting such leases" be treated as "real rights and incorporeal immovables". *Arkansas Louisiana Gas Co. v. R. O. Roy & Co.*, 196 La. 121, 198 So. 768; *Davidson v. Mid-states Oil Corporation*, 211 La. 882, 31 So.2d 7; *Wier v. Glassell*, 216 La. 828, 44 So.2d 882; *Acadian Production Corp. of Louisiana v. Tennant*, 222 La. 653, 63 So.2d 343. However difficult it may be to square these holdings with others by the same court in which, for other purposes, a mineral lease is characterized as emphatically *not* a real right, see, e.g., *Reagan v. Murphy*, 235 La. 529, 105 So.2d 210; *Tinsley v. Seismic Explorations, Inc.*, 239 La. 23, 117 So.2d 897; *Hodges v. Long-Bell Petroleum Company*, 240 La. 198, 121 So.2d 831 (on rehearing); *Harwood Oil & Mining Company v. Black*, 240 La. 641, 124 So.2d 764, this court must accept them as announcing the substantive law of Louisiana.

Since the question is basic to the very existence of a cause of action and may significantly affect the result, the Rule of Decisions Act, 28 U.S.C. §1652, as interpreted in *Erie v. Thompkins*, 304 U.S. 64, and *Guaranty Trust v. York*, 326 U.S. 64, compels adherence to the local law and overrides the more liberal policy of F.R.Civ.P., Rule 43(b). *Macias v. Klein*, 3 Cir., 203 F.2d 205; cf. *Kossick v. United*

Fruit Co., 365 U.S. 731. See also, *Zacharie v. Franklin*, [fol. 192] 37 U.S. (12 Peters) 151; *Grafton v. Cummings*, 99 U.S. (9 Otto) 100; *Moses v. Lawrence County Bank*, 149 U.S. 298.

J. S. W.

[fol. 195]

Civil Action No. 8937

PAN AMERICAN PETROLEUM CORPORATION, a corporation,

versus

FLOYD A. WALLIS.

COMPLAINT OF PAN AMERICAN PETROLEUM CORPORATION—
Filed April 13, 1959

I.

Plaintiff, Pan American Petroleum Corporation (formerly Stanolind Oil & Gas Co.), hereinafter referred to as Pan American, is a corporation organized and existing under the laws of the State of Delaware and duly qualified and doing business as a foreign corporation under the laws of the State of Louisiana.

II.

Defendant, Floyd A. Wallis, hereinafter referred to as Wallis, is a citizen of the Parish of Orleans, State of Louisiana.

III.

The matter in controversy herein exceeds, exclusive of interest and costs, the sum of \$10,000.00.

IV.

On March 3, 1955 Pan American and Wallis entered into a written agreement, a copy whereof is hereunto annexed and made a part hereof, and marked P-1 for identification herewith, the said agreement being hereinafter referred to as "the option agreement."

V.

The said option agreement granted to Pan American the right and option at Pan American's election to acquire any and all oil and gas leases which Wallis might obtain covering the lands described more particularly in the option agreement and being the identical lands described in then pending applications which Wallis had filed on June 2, 1954 with the Bureau of Land Management and to which serialized numbers BLM-A 037435, BLM-A 037436, BLM-A 037437, BLM-A 037438 and BLM-A 037439 had been assigned.

[fol. 196]

VI.

During and contemporaneously with the confection and execution of the option agreement both parties thereto recognized and understood that the principal motive, objective and consideration of the option agreement were the acquisition by Wallis from the Bureau of Land Management of an oil and gas lease or leases on the specific land described in the option agreement irrespective whether said lands technically were acquired lands or public lands within the meaning of the appropriate Federal Leasing Statutes.

VII.

In Article II of the option agreement Wallis agreed "to make diligent efforts to acquire leases on, to acquire the right to lease all lands described in the above referred to applications, and to obtain the issuance of leases to him covering all of said lands."

VIII.

When Wallis filed the aforesaid applications on June 2, 1954 conflicting applications were pending before the Bureau of Land Management, Department of Interior in the name of Henry S. Morgan, whose applications had been filed on January 27, 1954 on Forms for Acquired Lands and also Public Lands.

IX.

By reason of the Wallis applications and the pendency of the conflicting Morgan applications for the identical lands, as either acquired lands or public lands, Wallis after conferences with responsible officials of the Bureau of Land Management, determined to file and did file on March [fol. 197] 8, 1956 a Public Lands Application with the Bureau of Land Management covering the identical land described in the option agreement and the Acquired Lands Application of Wallis then pending.

X.

The filing by Wallis of the said Public Lands Application had as its purpose the acquisition of a lease on the described lands whether the said lands were determined ultimately to be acquired lands or public lands.

XI.

Contemporaneously with the signing of the option agreement of March 3, 1955, Wallis advised plaintiff that Henry S. Morgan had filed not only an application for lease on acquired lands, but also an application for lease on public lands, and in line with his obligations "to make diligent efforts to acquire leases," Wallis inquired whether plaintiff thought he should do likewise. Plaintiff advised Wallis that the question whether or not an application for lease on public lands should be filed by him was one to be determined by Wallis and his advisors in Washington, both Wallis and

plaintiff considering it an integral part of the consideration for the option agreement for Wallis to make such a determination in the mutual interests of both parties and for Wallis to take any other additional action which might be necessary or desirable to achieve the objectives of the option agreement "to acquire the right to lease all lands described in the above referred to applications."

XII.

The filing by Wallis of the Public Lands Application aforementioned was without the knowledge of Pan American [fol. 198] can but actually was in strict conformity with the obligations of Wallis to obtain the issuance of an oil and gas lease or leases on the said lands, whether said lands were acquired lands or public lands.

XIII.

On December 18, 1958, effective as of January 1, 1959, the Secretary of the Interior issued a Public Lands Oil and Gas Lease to Wallis pursuant to Public Lands Application BLM-042017 which had been filed by Wallis on March 8, 1956 covering the identical lands described in the option agreement with Pan American.

XIV.

Wallis did not advise Pan American of the issuance of the aforesaid Public Lands Oil and Gas Lease on December 18, 1958 and Pan American obtained independent knowledge thereof long after the issuance of said lease.

XV.

Between March 3, 1955 when the option agreement was signed and the time when Pan American learned of the issuance of the said Public Lands Oil and Gas Lease, Wallis was contacted by Pan American at regular intervals of approximately 90 days and, additionally, Wallis and Pan

American's representatives throughout said period discussed the status of the lease application of Wallis and Wallis never indicated to Pan American at any time during this entire period that he had filed a Public Lands Application in addition to the Acquired Lands Application, nor did he indicate that there was any question whatsoever that Pan American had the right under the option agreement to acquire any lease which he might in either case obtain on the said lands.

[fol. 199]

XVI.

The aforesaid applications filed in the name of Henry S. Morgan prior to the filing of the application by Wallis created a controversy which resulted in a decision by the Director of the Bureau of Land Management on June 5, 1957 which Henry S. Morgan appealed to the Secretary of the Interior and which appeal was decided on August 27, 1958 in favor of Wallis, a copy of said decision of the Interior Department (65 ID., No. 9) being attached hereto and made a part hereof.

XVII.

In the aforesaid controversy Wallis failed to take a definitive position on whether the lands applied for by him are of the one type or the other, i.e., whether acquired lands or public lands and in the said decision of the Interior Department it was decided that Wallis was willing to accept a lease under either statute.

XVIII.

The Director of the Bureau of Land Management in the decision dated June 5, 1957 held that the lands involved were leasable only as public lands and as Wallis was maintaining both types of offers Wallis avoided insisting in said proceeding that the Director's determination was in error.

XIX.

Since neither Morgan nor Wallis took a definite position on whether the lands were acquired or public lands, the Interior Department in the said decision of August 27, 1958 saw no reason to disturb the Director's finding that the lands are leasable under the Mineral Leasing Act of 1920, as amended, and not under the Mineral Leasing Act for [fol. 200] Acquired Lands, the failure of Wallis to take a definitive position conforming strictly to his obligations under the option agreement "to make diligent efforts to acquire leases on, to acquire the right to lease all lands described in the above referred to applications, and to obtain the issuance of leases to him covering all of said lands." Whether said lands were acquired lands or public lands by statute, and the conduct of Wallis aforesaid coupled with all other circumstances delineated herein constituted a contemporaneous construction of the option agreement consonant with the declared intention of the parties thereto upon its execution.

XX.

Any construction of the option agreement which would permit Wallis to retain the lease of December 18, 1958 for his personal benefit is in conflict with and violative of the obligations undertaken by Wallis in the option agreement to make diligent efforts to acquire leases on the said lands without reference to the technical type or character of the said lands and Wallis in equity and good conscience is estopped from claiming the fruits of the after-acquired lease of December 18, 1958 in contravention of his obligations under the option agreement and estoppel in the premises is hereby specially averred.

XXI.

The consideration paid to Wallis for the option agreement was \$8,300.00 cash and Wallis agreed to notify Pan American in writing when a lease or leases were issued to him and Pan American had and has 15 days after receipt

of such notice to advise Wallis whether it elects to acquire said lease or leases from him. Upon Pan American's election to acquire any said lease or leases, Wallis in said option agreement is obligated to transfer within 10 days thereafter all of his right, title and interest in and to said leases reserving to himself an overriding royalty interest, (subject to reduction as in said option agreement provided) equal to one-eighth of eight-eighths ($1/8$ of $8/8$) for a consideration which, at the election of Wallis, shall be either (a) Ninety Dollar (\$90.00) per acre for each acre covered by the leases assigned, or (b) the reservation by Wallis of a production payment in the amount of Ninety Dollars (\$90.00) per acre for each acre covered by the leases assigned, payable out of one-thirty-second of eight-eighths ($1/32$ of $8/8$), or (c) a combination of cash consideration and production payments out of one-thirty-second of eight-eighths ($1/32$ of $8/8$) at the election of Wallis, which shall total Ninety Dollars (\$90.00) per acre for each acre covered by the leases assigned.

XXII.

Wallis has never notified Pan American in writing of the issuance to him of Public Lands Lease BLM 042017 and notwithstanding Pan American's demand upon him to do so Wallis has refused orally to perform his obligations under the option agreement.

XXIII.

Pan American desires to exercise its rights under the option agreement, is ready, able and willing to perform its obligations thereunder, and is entitled to specific performance thereof by Wallis.

XXIV.

Since the filing of the aforescribed applications by Wallis, producing oil wells have been brought in on adjoining lands.

[fol. 202]

XXV.

The lands embraced by Public Lands Lease BLM 042017 issued to Wallis are currently suffering drainage from wells of others on lands immediately adjacent thereto and Pan American and the United States of America have sustained and are continuing to sustain heavy losses from such drainage as the proximate results of the failure and refusal of Wallis to comply with his obligations under the option agreement, Pan American hereby specially averring that to Wallis' knowledge Pan American has been willing and is now ready to take steps immediately to prevent the further drainage thereof, and Pan American reserves all its rights against Wallis for losses which it has suffered or may suffer attributable to said drainage.

Wherefore, Pan American Petroleum Corporation prays that the defendant, Floyd A. Wallis, be duly cited to appear and answer this Petition, that he be served with a copy thereof and that, after due proceedings had, there be judgment herein in favor of petitioner, Pan American Petroleum Corporation, and against the defendant, Floyd A. Wallis, ordering the said defendant to specifically perform his obligations under the option agreement dated March 3, 1955, and further ordering the defendant to transfer by formal assignment to Pan American Petroleum Corporation all of his right, title and interest in and to the lease of December 18, 1958, effective as of January 1, 1959, issued by the Secretary of the Interior to defendant pursuant to Public Lands Application BLM 042017, reserving to defendant the overriding royalty interest described in said option agreement, all on condition that Pan American Petroleum Corporation discharge contemporaneously [fol. 203] therewith its obligation to pay the consideration for said assignment as in said agreement of March 3, 1955 provided according to the election of defendant.

Petitioner further prays for judgment herein against the defendant, in the event the defendant does not execute the formal assignment as directed by the Court, decreeing

Pan American Petroleum Corporation to be the owner of the aforescribed lease of December 18, 1958 issued by the Secretary of the Interior to Wallis subject to the ownership of Wallis of the overriding royalty and consideration provided for in the option of March 3, 1955.

Petitioner further prays that the aforesaid judgment reserve unto petitioner all of petitioner's rights to recover damages resulting from drainage of the lands covered by the said lease of December 18, 1958.

Petitioner further prays for all full, general and equitable relief as the nature of the case may require and law and equity may permit, and for all costs.

William P. Hardeman, Percy Sandel, Cobb & Wright,
By: Lloyd J. Cobb, Whitney Building, New Orleans, La., Attorneys for Defendant, Pan American Petroleum Corporation.

[fol. 203a]

EXHIBIT P-1 TO COMPLAINT

STATE OF LOUISIANA :

PARISH OF ORLEANS :

THIS AGREEMENT, made this 3 day of March, 1955, by and between FLOYD A. WALLIS, a resident of the Parish of Orleans, State of Louisiana, hereinafter referred to as "Wallis", and STANOLIND OIL AND GAS COMPANY, a Delaware corporation, hereinafter referred to as "Stanolind".

WITNESSETH, That

WHEREAS, Wallis has heretofore filed with the United States Department of the Interior, Bureau of Land Management, applications for five (5) non-competitive oil and gas leases on acquired lands, which applications have been assigned the following Bureau of Land Management numbers and cover the following described lands in Plaquemines Parish, Louisiana, to-wit:

B.L.M.A.-037435 [Metes and Bounds Description Omitted]

The above parcel of land is estimated to contain an area of 348.80 acres, more or less.

B.L.M.-A.-037436 [Metes and Bounds Description Omitted]

[fol. 203b] The above parcel of land is estimated to contain an area of 19.76 acres, more or less.

B.L.M.-A.-037437 [Metes and Bounds Description Omitted]

The above parcel of land is estimated to contain an area of 182.63 acres, more or less.

B.L.M.-A.-037438 [Metes and Bounds Description Omitted]

The above parcel of land is estimated to contain an area of 221.05 acres, more or less.

B.L.M.-A.-037439 [Metes and Bounds Description Omitted]

[fol. 203c] The above parcel of land is estimated to contain an area of 54.07 acres, more or less.

WHEREAS, Wallis, in consideration of Eight Thousand Three Hundred Dollars (\$8,300.00) cash in hand paid, receipt of which is hereby acknowledged, has agreed to grant to Stanolind an option to acquire from Wallis any and all oil and gas leases which he will acquire in the event the said applications are approved and leases issued in response to such applications.

NOW, THEREFORE, in consideration of the premises, the parties hereto do hereby mutually agree by and between themselves as follows:

I.

Wallis does hereby grant to Stanolind the right and option, at Stanolind's election, to acquire any and all oil and gas leases which may be issued to Wallis, his heirs or assigns, under and by virtue of the above referred to applications.

II.

Wallis agrees to make diligent efforts to acquire leases on, to acquire the right to lease all lands described in the above referred to applications and to obtain the issuance of leases to him covering all of said lands.

III.

Wallis shall notify Stanolind in writing at its office in the Pan American Insurance Building, 2400 Canal Street, New Orleans, Louisiana, when leases have been issued to him under said applications and Stanolind shall, within fifteen (15) days after receipt of such notice, advise Wallis whether or not it elects to acquire such lease or leases from him. If Stanolind notifies Wallis that it does not desire to acquire leases from him or fails to notify Wallis of its election to exercise its option within said fifteen (15) day period, Stanolind's right to acquire leases hereunder shall lapse and there shall be no obligation on Wallis to transfer said leases.

IV.

If Stanolind elects to acquire said leases, Wallis agrees to transfer, within ten (10) days thereafter, to Stanolind all of his right, title and interest in and to said leases, [fol. 203d] reserving to himself an overriding royalty interest equal to one-eighth of eight-eighths ($1/8$ of $8/8$) for a consideration which, at the election of Wallis, shall be either (a) Ninety Dollars (\$90.00) per acre for each acre covered by the leases assigned, or (b) the reservation in Wallis of a production payment in the amount of Ninety

Dollars (\$90.00) per acre for each acre covered by the leases assigned, payable out of one-thirty-second of eight-eighths ($1/32$ of $8/8$), or (c) a combination of cash consideration and production payments out of one-thirty-second of eight-eighths ($1/32$ of $8/8$) at the election of Wallis, which shall total Ninety Dollars (\$90.00) per acre for each acre covered by the leases assigned.

V.

It is understood and agreed that there shall be deducted from the one-eighth of eight-eighths ($1/8$ of $8/8$) overriding royalty reserved by Wallis all overriding royalties, production payments, net profits obligations, carried working interest and other payments out of or with respect to production with which the lease acreage is encumbered over and above the lessor's royalty on the date of the assignment to Stanolind. Wallis agrees that the leases shall not be burdened with such interests over and above the lessor's (United States) royalty in excess of the one-eighth of eight-eighths ($1/8$ of $8/8$) to be reserved by him.

VI.

It is agreed that if assignments of leases are made to Stanolind under this agreement, such assignments shall provide that Stanolind shall have the right and power to pool or combine the acreage covered by the leases or any portion thereof with other land, lease or leases in the immediate vicinity thereof, in any manner provided by said leases, or by law, and in the event of such pooling, Wallis shall receive in lieu of the overriding royalties specified on production from the unit so pooled only such portion of such overriding royalties as the amount of his acreage placed in the unit or his overriding royalty interest thereon on an acreage basis bears to the total acreage so pooled in the particular unit involved.

VII.

The terms, covenants and conditions of the agreement shall be binding and shall inure to the benefit of the parties hereto, the successors and assigns of Stanolind, and the heirs, executors, administrators, personal representatives and assigns of Wallis.

[fol. 203e] THUS DONE AND SIGNED by the parties hereto in the presence of the undersigned competent witnesses on the day and date first above written.

/s/ FLOYD A. WALLIS
Floyd A. Wallis

STANOLIND OIL AND GAS COMPANY
By /s/ W. C. IMBT

WITNESSES:

/s/ JOHN L. LIPPA
/s/ EDWIN A. ELLINGHAUSEN, JR.
/s/ W. B. BOLES
/s/ JOAN VEHALAGE

STATE OF LOUISIANA :
PARISH OF ORLEANS :

Before me, the undersigned Notary Public, on this day personally appeared John L. Lippa, who, being by me duly sworn, stated under oath that he was one of the subscribing witnesses to the foregoing instrument and that the same was signed by FLOYD A. WALLIS in his presence and in the presence of Edwin A. Ellinghausen, Jr., the other subscribing witness.

/s/ JOHN L. LIPPA

Sworn to and subscribed
before me this 4th
day of March, 1955.

/s/ HENRY G. NEYREY, JR.
Notary Public
[Seal]

STATE OF TEXAS :
COUNTY OF HARRIS :

On this 5 day of March, 1955, before me appeared W. C. Imbt, to me personally known, who, being by me duly sworn, did say that he is the Attorney-in-Fact for STANO-LIND OIL AND GAS COMPANY, and that the foregoing instrument was signed in behalf of said corporation by authority of its Board of Directors, and said W. C. Imbt acknowledged said instrument to be the free act and deed of said corporation.

/s/ GERTRUDE OLIVER
Notary Public

GERTRUDE OLIVER
Notary Public in and for Harris County, Texas

[Seal]

[fol. 210]

IN UNITED STATES DISTRICT COURT

ANSWER OF FLOYD A. WALLIS—Filed January 27, 1960

Now comes Floyd A. Wallis, Defendant, and in response [fol. 211] to the complaint filed herein by Pan American Petroleum Corporation avers:

1.

The allegations of the complaint do not state a claim upon which any relief can be granted; and, therefore, this suit should be dismissed.

2.

Categorically answering the allegations of the complaint defendant avers:

(a) The allegations of Paragraphs I, II, III, IV, VIII and XXIV are admitted.

(b) The allegations of Paragraphs V, VI, VII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX, XX, XXI, XXII, XXIII and XXV are denied, except as may be hereinafter otherwise specifically admitted.

3.

The option agreement of March 3, 1955 (P-1) is clear and unambiguous and speaks for itself and respondent denies any and all allegations of the complaint which would vary the terms thereof. Accordingly, defendant denies that the Public Domain Lands Application filed by him with the Bureau of Land Management on or about March 8, 1956, was within the contemplation of the option agreement or was filed by reason of the acquired lands applications referred to in the option agreement of March 3, 1955; and defendant denies that the purpose of the option agreement was to give plaintiff rights in any leases that might have [fol. 212] been issued under applications other than those specifically mentioned in the said option agreement.

(a) In the alternative, and only in the event that it is found that the provisions of said agreement are not clear and unambiguous, respondent would show that the parties by their actions have construed said agreement in such a way as to clearly show that Public Domain Lands Lease BLM 042017 was not within the contemplation of said agreement.

4.

Defendant would show that he was under no obligation to advise plaintiff of the filing of the Public Domain Lands Application; and if plaintiff received any information from defendant on the filing of such Application or otherwise, it was on a purely informal basis and defendant never formally notified plaintiff of such filing or of the progress of such Application or of the final results therefrom.

5.

Defendant has reason to believe and so avers that plaintiff kept itself currently informed of all of the applications that were filed by defendant, and, during the entire time that defendant was prosecuting his Public Domain Lands Application, plaintiff did absolutely nothing to assist defendant, never offered to assist defendant, and never advised defendant that it claimed any right or interest under defendant's Public Domain Lands Application; and defendant spent approximately five years and in excess of \$50,000.00 in prosecuting the said applications (both Acquired and [fol. 213] Domain Lands Applications), all without any contribution (in services or funds) having been made or offered by plaintiff, except that prior to May 19, 1955, one R.K. Daley, a Civil Engineer employed by plaintiff, furnished several plats, or overlay maps, showing the lands described in defendant's Acquired Lands Application in relation to other applications that had been previously filed by one Morgan.

(a) The plaintiff is guilty of laches.

(b) The plaintiff knew that this defendant was spending substantial sums in prosecuting his Domain Lands Application and that defendant did not consider the aforementioned agreement of March 3, 1955, as covering the Domain Lands Application or the lease sought thereunder. If defendant had known that plaintiff claimed, or would claim, an interest in said Domain Lands Application and/or lease, defendant would not have spent such funds in prosecuting said application. The plaintiff, therefore, is estopped to contend that the agreement of March 3, 1955, included, or should be construed as including, the Public Domain Lands Lease No. BLM 042017.

6.

With respect to Paragraph XXV, defendant would show that the plaintiff had and has no right to the assignment of

defendant's Public Domain Lands Lease No. BLM 042017; but even if plaintiff has the right to the assignment of said lease (which is denied) the property covered thereby, although being drained, could not be protected by defendant because plaintiff deliberately and intentionally caused the [fol. 214] State of Louisiana to bring an action in the Parish of Plaquemines, Louisiana, not only to enjoin and restrain defendant from exercising his rights under the said lease, but also to remove from the records of the Parish of Plaquemines, Louisiana, the said lease and to have it declared a cloud upon the alleged title of the State of Louisiana. Furthermore, plaintiff filed a notice of lis pendens in this cause in the Parish of Plaquemines and caused Patrick A. McKenna, who filed Civil Action No. 8904 now pending before this Honorable Court, to file a notice of lis pendens in the Parish of Plaquemines; and plaintiff did everything within its power to prevent and actually prevented, defendant from drilling the leased property in order to protect it from being drained by adjacent wells. Therefore, whatever, if any, damages plaintiff has suffered, have resulted from plaintiff's own untoward actions.

7.

Defendant is informed and believes and so avers that while active steps were being taken by plaintiff to protect against drainage the lands covered by Public Domain Lands Lease BLM 042017, plaintiff was conspiring, and had conspired, with Shell Oil Company and the California Company, mineral lessees of the State of Louisiana, to prevent the drilling of said lands by defendant; and that plaintiff did everything within its power to prevent defendant from exercising his said lease, even to the extent of forcing the State of Louisiana to institute an action for the purpose of questioning the title of the United States of America to [fol. 215] the property which is subject to said lease.

8.

Plaintiff, therefore, comes into this court with unclean hands and is not entitled to the equitable remedy of specific performance; or any other equitable relief.

Alternative Plea

In the alternative, and only in the event that this Honorable Court should hold that plaintiff is entitled to have defendant assign to it the lease issued under Public Domain Lands Application No. BLM 042017 (which is denied), then and in such event, defendant is entitled to an order requiring that the plaintiff pay to defendant simultaneously with the execution of said assignment, the sum of \$90.00 per acre for 826.87 acres, and that plaintiff be required at the same time to permit defendant to retain under the said lease an overriding royalty interest equal to one-eighth (1/8) of eight-eighths (8/8).

Wherefore, this defendant, Floyd A. Wallis, prays that plaintiff's suit be dismissed at its cost.

In the alternative, defendant prays that if the court should hold the plaintiff is entitled to an assignment of the lease issued under Public Domain Lands Lease Application BLM 042017 (which is denied), then the obligation of defendant to assign said lease should be conditioned upon the right of defendant to retain an overriding royalty interest equal to one-eighth (1/8) of eight-eighths (8/8), and the immediate payment by plaintiff to defendant of the sum of \$74,418.30.

[fol. 216] C. Ellis Henican, Attorney for Respondent,
1112 Hibernia Building, New Orleans 12, Louisiana.

Murray F. Cleveland, Attorney for Respondent, 1112
Hibernia Building, New Orleans 12, Louisiana.

[fol. 217]

IN UNITED STATES DISTRICT COURT

AMENDED ANSWER OF FLOYD A. WALLIS—

Filed January 20, 1961

Comes Now, Floyd A. Wallis, defendant in the above numbered and styled Civil Action No. 8937, and subject to leave of Court amends his answer, as heretofore filed therein, in the following particulars, to-wit:

9.

This defendant desires to amend his original answer heretofore filed in Civil Action No. 8937, by adding thereto the following defenses, to-wit:

10.

The option agreement between Wallis and Pan-Am, dated March 3, 1955, terminated or expired, and/or the rights of Pan-Am thereunder prescribed or perempted, all on March 3, 1958, by virtue of the provisions of Section 27 of the Mineral Leasing Act of 1920, 41 Stat. 448, 30 U.S.C.A. 184, as amended subsequent thereto and including the amendment by Act of Congress of August 2, 1954, C. 650, 68 Stat. 648; U.S. Code Cong. and Adm. News, 83 Cong. 2nd Sess. (1954), Vol. 1, C. 650, Pub. 561, page 747, which statute Wallis herewith specially pleads in bar to said agreement or the assertion of any rights or cause of action pursuant thereto, as having been prescribed and/or perempted by virtue thereof.

11.

Any purported contract or agreement to sell, which resulted when Pan-Am exercised its option and notified Wallis that it elected to acquire the "public domain" lease No. [fol. 218] BLM-042017 is not a binding contract since it is entirely lacking in mutuality and, therefore, was not and is not binding on either party, inasmuch as it leaves it solely

within the power, or election, of one of the parties to (a) fix the price or consideration; or (b) to reserve a full production payment and thereby leave the agreement without there being either a price or any consideration to support a completed sale, which would thus be a nullity.

12.

Immediately upon the issuance by the United States unto this defendant of the lease, BLM-042017, defendant shows that one Henry S. Morgan, being the same Henry S. Morgan as referred to in Article VIII of the complaint herein, instituted in the United States District Court for the District of Columbia, Civil Action No. 3248-58 entitled "Henry S. Morgan v. Fred A. Seaton, Secretary of the Interior". The purpose of said suit generally, among other things, seeks to have declared null and void the issuance of the said lease, BLM-042017, and to direct the Secretary to cancel same and to reinstate certain applications filed by the said Morgan and to direct the Secretary to issue public lands leases to the said Morgan pursuant to said applications. This defendant shows that he forthwith intervened in said proceeding in order to assert and maintain the validity of the said lease BLM-042017.

Plaintiff herein has taken the position in this proceeding, that same being an equitable proceeding, that immediately upon the exercise by it of the option agreement and the filing of this suit, equity does and would consider this [fol. 219] plaintiff to be the owner of the said lease BLM-042017, and, after the filing of this Civil Action No. 8937, plaintiff filed a motion to intervene as defendant in the suit above referred to and which was filed by Henry S. Morgan, reciting that this defendant Wallis had thereafter referring to this suit Civil Action No. 8937, asserted that this plaintiff "is the beneficial owner of said lease designated BLM-042017 and all rights pertaining thereto", and that it "is a necessary real party in interest herein". It was further alleged in said motion by plaintiff that "the representation

of Pan American Petroleum Corporation by Wallis or the defendant Seaton may be inadequate . . .". This defendant would show that as admitted by plaintiff in the foregoing motion, that if this plaintiff in fact had any claim or right to the said lease BLM-042017, which is denied, that nevertheless it recognized that this defendant's appearance and intervention in said action was representing such rights, if any, of this plaintiff, and this defendant would show that in doing so he has been required to engage counsel and incur considerable expense in connection therewith, all to the knowledge of this plaintiff, and that, while such was recognized by this plaintiff by its motion to intervene, yet shortly after the filing of the motion to intervene and on or about June 5th, 1959, this plaintiff did withdraw its motion to intervene in the Morgan suit, and has thereby left this defendant to assume the burden and expense of the defense of its alleged rights despite the fact that there was (and could) not be any such obligation on behalf of this defendant. In these proceedings, plaintiff, Pan American [fol. 220] Petroleum Corporation, is seeking the equitable relief of specific performance. At the same time and for the reasons herein stated, plaintiff, Pan American Petroleum Corporation, has failed to do equity and said plaintiff has unclean hands and may not, therefore, obtain and is estopped from claiming the relief herein sought.

13.

Under appropriate regulations issued by the Secretary of Interior, and in force and effect, at the time of the execution of the option agreement between Wallis and Pan-Am, dated March 3, 1955, as well as at the time when Wallis filed his application for the lease No. BLM-042017 and at the time of the issuance of said lease, and, presently in force and effect, it is provided:

- (1) "§ 192.140. Assignments or transfers of leases or interests therein. Leases may be assigned or subleased as to all or part of the leases acreage and as to either

a divided or undivided interest therein to any person or persons qualified to hold a lease. Subject to final approval by the Bureau of Land Management, assignments, or subleases shall take effect as of the first day of the month following the date of filing in the proper land office of all the papers required by § 192.41 and § 192.42." 43 C.F.R. page 378, Revised, 1954.

(2) "§ 192.141. Requirements for filing or transfers.

• • • • •

[fol. 221]

- (2) To obtain approval of a transfer affecting the record title of an oil and gas lease, a request for such approval must be made, within 90 days from the date of the execution of the assignment by the parties . . .

• • • • •

- (f) Unless the lease account is in good standing as to the area covered by the assignment when the assignment and bond are filed, or is placed in good standing before the assignment is reached for action the lease will be cancelled as provided in § 192.161."

- (3) "§ 192.83. Limitation of overriding royalties. Any agreement to create overriding royalties or payments out of the production of any lease which, when added to overriding royalties or payments out of production previously created and to the royalty payable to the United States, aggregate in excess of 17½ percent shall be deemed a violation of the terms of the lease unless such agreement expressly provides that the obligation to pay such excess overriding royalty or payments out of production shall be suspended when the average production per well per day averaged on the monthly basis is (a) as to

[fol. 222] oil, 15 barrels or less and (b) as to gas, 500,000 cubic feet or less. The limitations in this section will apply separately to any zone or portion of a lease segregated for computing Government royalty." 43 C.F.R., page 375.

In the event, and only in the event, that this Court should hold that the lease No. BLM-042017 is subject to the terms and provisions of said option agreement, of date March 3, 1955, and that by the terms thereof Pan-Am is entitled to an assignment thereof, pursuant to the provisions of said option agreement, any such assignment would entitle Wallis to reserve an overriding royalty of one-eighth of the total production from said property, which when combined with the one-eighth royalty reserved unto the United States, would exceed the maximum of $17\frac{1}{2}$ per cent permitted by the above quoted §192.83, and, accordingly, the execution of such an assignment would conflict with said section, resulting in a breach of said lease, which would mean that the Bureau of Land Management would not approve such an assignment, thus rendering such assignment inoperative, and, in addition, the Bureau of Land Management would take steps to cancel the lease. In light of the foregoing a court of equity, in an equitable proceeding, should not enforce said option agreement, for the following additional reasons, to-wit:

- (1) Ordering this defendant to execute such an assignment would be requiring this defendant to do a vain and useless thing.

[fol. 223] (2) The option agreement, because of the foregoing regulations, is impossible to perform.

- (3) A court of equity will not order a party to do an act, which would in turn require that party to breach another contract, and, thereby violate the law.
- (4) A court of equity will not issue a decree which it cannot enforce, and in light of the foregoing a court

could not require the Bureau of Land Management to approve such an assignment, and without such approval, the assignment would be inoperative.

- (5) Under the equitable doctrine of balancing the equities and conveniences, as respects the parties, the enforcement of the option agreement which would result in breaching the lease, would not serve to benefit this plaintiff, whereas it would entail a very substantial loss to this defendant, all out of proportion to any possible gain to this plaintiff,

all of which, this defendant pleads in bar to the relief sought herein.

Wherefore, this defendant, Floyd A. Wallis, prays that this amended answer be allowed, and that there be judgment herein as prayed for in his original answer.


[fol. 224] Horace M. Holder, 1300 Beck Building,
Shreveport, Louisiana;

C. Ellis Henican, 1112 Hibernia Building, New
Orleans, Louisiana;

By: C. Ellis Henican,
Attorneys for Floyd A. Wallis.

[fol. 224a]

IN UNITED STATES DISTRICT COURT

(See opposite) 

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

Surveyed No. 10, 100, 1000

Offer

Serial No. 042017

OFFER TO LEASE AND LEASE FOR OIL AND GAS

(Sec. 17 Noncompetitive 5-Year Public Domain Lease)

Receipt No.

THIS OFFER MAY BE REJECTED AND RETURNED TO THE OFFEROR AND WILL AFFORD THE OFFEROR NO PRIORITY IF IT IS NOT PROPERLY FILLED IN AND EXECUTED OR IF IT IS NOT ACCOMPANIED BY THE REQUIRED DOCUMENTS OR PAYMENTS. SEE ITEM 9 OF GENERAL INSTRUCTIONS

(Fill in on a type-writer or print plainly in ink and sign in ink)

Mr.
1. W. A. WILSON

(Name)

806 Carondelet Building

(Number and Street)

New Orleans 12, La.

(City and State)

hereby offers to lease all or any of the lands described in item 2 that are available for lease, pursuant and subject to the terms and provisions of the act of February 25, 1920 (41 Stat. 437, 30 U.S.C. sec. 181), as amended, hereinafter referred to as the act, and to all reasonable regulations of the Secretary of the Interior now or hereafter in force, when not inconsistent with any express and specific provisions herein, which are made a part hereof.

PLEASE NOTIFY THE
SIGNING OFFICER OF
ANY CHANGE OF ADDRESS

2. Land requested

Louisiana, Plaquemine Parish

(State) (County)

T. R. Louisiana Meridian

(State)

T. R.

Meridian

The land requested is unsurveyed and is described in Exhibit A and indicated on sheets 7, 8, 8A, 9, 9A and 10 of the map of the Paces of the Mississippi River, Louisiana, prepared by the Office of the District Engineer, New Orleans, La., Corps of Engineers, U.S. Army. The said Exhibit A and sheets of said map are attached hereto and made a part hereof.

This lease embraces the area and land described in Item 2.

The rental retained is the rental amount shown in Item 4, plus an additional payment of \$113.50.

3. Land included in lease

(Not to be filled in by Offeror)

Total Area 806.87 Acres

Total Area Acres Rental retained \$

4. Amount remitted: Filing fee \$10, Rental \$113.50 Total \$123.50

5. Undesignated certifies as follows:

(a) Offeror is a citizen of the United States. Native born Yes. Naturalized Yes. Corporation or other legal entity (specify what kind):

(b) Offeror's interests direct and indirect in oil and gas leases and applications or offers therefor including this offer do not exceed 40,000 chargeable acres in the same State, or 100,000 chargeable acres in Alaska. (c) Offeror accepts as a part of this lease, to the extent applicable, the stipulations provided for in 43 CFR 191.6. (d) Offeror is 21 years of age or over (or if a corporation or other legal entity, is duly qualified as shown by statements made or referred to herein). (e) Offeror has described all surveyed lands by legal subdivisions and unsurveyed lands by metes and bounds, and further states that there are no settlers on unsurveyed lands described herein.

6. Offeror's signature to this offer shall also constitute offeror's signature to, and acceptance of, this lease and any amendment thereto that may cover any land described in this offer open to lease application at the time the offer was filed but omitted from this lease for any reason, or signature to, or acceptance of, any separate lease for such land. The offeror further agrees that (a) this offer cannot be withdrawn, either in whole or in part, unless the withdrawal is received by the land office before this lease, an amendment to this lease, or a separate lease, whichever covers the land described in the withdrawal, has been signed in behalf of the United States, and (b) this offer and lease shall apply only to lands not within a known geologic structure of a producing oil or gas field at the time the offer is filed.

7. If this lease form does not contain all of the terms and conditions of the lease form in effect at the date of filing, the offeror further agrees to be bound by the terms and conditions contained in that form.

8. It is hereby certified that the statements made herein are complete and correct to the best of offeror's knowledge and belief and are made in good faith.

IN WITNESS WHEREOF, Offeror has duly executed this instrument this

WITNESSES

day of March 10 1959

W. A. Wilson (Name and address)

(Name and address)

(Name and address)

(Lease signature)

(Lease signature)

This lease for the lands described in item 3 above is hereby issued, subject to the provisions of the offer and on the reverse side hereof.

THE UNITED STATES OF AMERICA

DEC 10 1959

By W. A. Wilson (Signature)
Chief, Minerals Adjudication Section

Effective date of lease January 1, 1959.

18 U. S. C. sec. 1001 makes it a crime for any person knowingly and willfully to make to any Department or agency of the United States any false, fictitious or fraudulent statements or representations as to any matter within its jurisdiction.

This form may be reproduced provided that the copies are exact reproductions on one sheet of both sides of this official form, in accordance with the provisions of 43 CFR 192.42 (a).

[fol. 224c]

EXHIBIT A

The land requested is unsurveyed and is located in Plaquemines Parish, Louisiana. It consists of five tracts containing an estimated total of 826.87 acres, more or less. Each of the metes and bounds descriptions of the five tracts appearing below is connected with a corner of the public land surveys. That corner in each case is the southeast corner of fractional Section 3, Township 24 South, Range 30 East, Louisiana Meridian, Louisiana, as shown on the official plat of that fractional township approved May 18, 1842. In all other respects, including approximate legal subdivisions, each of the tracts is described in accordance with Sheets 7, 8, 8A, 9, 9A and 10 of the map of the *Passes of the Mississippi River, Southwest Pass, La.*, prepared by the Office of the District Engineer, New Orleans, La., Corps of Engineers, U. S. Army. Copies of the said sheets of the said map are attached hereto and are hereinafter referred to as the attached map. Each of the five tracts is indicated on the attached map by being colored green and is designated by the same letter assigned to it in the descriptions below.

The land requested is adjacent to land described in the deed from George Jurgens to the United States, dated July 8, 1903 and recorded on July 10, 1903 in Conveyance Office Book No. 37, Folio 527, in the office of the Clerk of Court and Recorder, Plaquemines Parish, Louisiana.

The land requested consists of all of that land belonging to the United States, including that acquired by accretion, alluvion, reliction or dereliction, described as follows:

TRACT A

Beginning at the southeast corner of fractional Section 3, Township 24 South, Range 30 East, Louisiana Meridian, Louisiana; thence south 12,760 feet and west 6,080 feet to the true point of beginning, to wit, the Northwest corner of the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 46, Township 24 South,

Range 30 East; thence in a northwesterly direction at a right angle to the thread of the stream, namely the Southwest Pass of the Mississippi River, a distance of 620 feet, more or less, to the low water mark of the left descending bank of Southwest Pass; thence in a southwesterly direction along the low water line of the left descending bank of Southwest Pass with the meanders of the stream a distance of 7,100 feet, more or less, to a point at the intersection of the low water line of the left descending bank of Southwest Pass and the north boundary line of the E $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 3, Township 25 South, Range 30 East; thence east along the said north boundary line a distance of 560 feet, more or less, to the northeast corner of the E $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 3, Township 25 South, Range 30 East; thence east along the north boundary line of the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 2, Township 25 South, Range 30 East, a distance of 1,320 feet to the northeast corner of the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 2, Township 25 South, Range 30 East; thence south along the east boundary line of the West $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 2, Township 25 South, Range 30 East, a distance of 1,380 feet, more or less, to a point where the above said line intersects the top bank line formed along East Jetty; thence in a northeasterly direction along the top bank line formed along and approximately paralleling East Jetty, with the meanders thereof, a distance of 1,830 feet, more or less, to a point where said top bank line intersects the west boundary line of the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 2, Township 25 South, Range 30 East, thence north along the said west boundary line a distance of 520 feet, more or less, to the northwest corner thereof; thence east along the north boundary line of the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 2, Township 25 South, Range 30 East, a distance of 770 feet, more or less, to the intersection of said line and the top of the west bank line of Bayou Burrwood; thence in a northeasterly direction along the top of the west bank line of Bayou Burrwood, with the meanders of the bayou, a distance of 1,465 feet, more or less, to a point at the intersection of said bank line and the west

[Initialed—F.A.W.] 1

[fol. 224d] 30 East, a distance of 1,380 feet, more or less, to a point where the above said line intersects the top bank line formed along East Jetty; thence in a northeasterly direction along the top bank line formed along and approximately paralleling East Jetty, with the meanders thereof, a distance of 1,830 feet, more or less, to a point where said top bank line intersects the west boundary line of the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 2, Township 25 South, Range 30 East, thence north along the said west boundary line a distance of 520 feet, more or less, to the northwest corner thereof; thence east along the north boundary line of the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 2, Township 25 South, Range 30 East, a distance of 770 feet, more or less, to the intersection of said line and the top of the west bank line of Bayou Burrwood; thence in a northeasterly direction along the top of the west bank line of Bayou Burrwood, with the meanders of the bayou, a distance of 1,465 feet, more or less, to a point at the intersection of said bank line and the west

boundary line of the E $\frac{1}{2}$ of the NE $\frac{1}{4}$ of section 2, Township 25 South, Range 30 East; thence north along the west boundary line of the E $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 2, Township 25 South, Range 30 East, a distance of 1,230 feet, more or less, to the northwest corner of the E $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 2, Township 25 South, Range 30 East; thence due north 2,640 feet to the point of true beginning.

The land described as aforesaid is indicated and designated Tract A on the attached map. The said tract of land is estimated to contain an area of 349.36 acres, more or less.

TRACT B

Beginning at the southeast corner of fractional Section 3, Township 24 South, Range 30 East, Louisiana Meridian, Louisiana; thence south, 20,680 feet and west 11,360 feet to the true point of beginning, to wit, the southeast corner of the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 3, Township 25 South, Range 30 East; thence north along the west boundary line of the E $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 3 a distance of 1,360 feet, more or less, to the intersection of said line and the low water mark of the left descending bank of Southwest Pass of the Mississippi River; thence in a southwesterly direction 1,740 feet, more or less, along the low water line of the left descending bank of Southwest Pass, with the meanders thereof, to a point where said low water line intersects the south boundary line of the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 3; thence east 860 feet, more or less, along the south boundary line of said Section 3 to the point of true beginning.

The land described as aforesaid is indicated and designated Tract B on the attached map. The said tract of land is estimated to contain an area of 19.76 acres, more or less.

[Initialed—F.A.W.]

2

[fol. 224e]

TRACT C

Beginning at the southeast corner of fractional Section 3, Township 24 South, Range 30 East, Louisiana Meridian, Louisiana; thence south 20,680 feet and west 10,040 feet to the true point of beginning, to wit, the southwest corner

of the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 2, Township 25 South, Range 30 East; thence east along the south boundary line of SW $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 2 a distance of 300 feet, more or less, to the top bank line formed along East Jetty; thence in a southwesterly direction along said top bank line a distance of 6,940 feet, more or less, to a point where said top bank line intersects the south boundary line of the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 10, Township 25 South, Range 30 East; thence west along the south boundary line of said Section 10 a distance of 1,060 feet, more or less, to the southwest corner thereof; thence north along the western boundary of said Section 10 a distance of 620 feet, more or less, to a point at the intersection of said line and the low water mark of the left descending bank of the Southwest Pass of the Mississippi River; thence in a northeasterly direction along the low water line of the left descending bank of Southwest Pass, with the meanders thereof, a distance of 2,480 feet, more or less, to a point at the intersection of said low water line and the north boundary of the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 10, Township 25 South, Range 30 East; thence east along the north boundary line of the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 10 a distance of 1,310 feet, more or less, to the northeast corner thereof; thence north along the west boundary line of the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 10, Township 25 South, Range 30 East, a distance of 1,320 feet to the northwest corner thereof; thence east along the south boundary line of the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 10 a distance of 1,320 feet to the southeast corner thereof; thence north along the east boundary line of the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 10 a distance of 1,320 feet to the northeast corner thereof; thence east along the north boundary line of the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 10, Township 25 South, Range 30 East, a distance of 1,320 feet to the point of true beginning.

The land described as aforesaid is indicated and designated Tract C on the attached map. The said tract of land is estimated to contain an area of 182.63 acres, more or less.

TRACT D

Beginning at the southeast corner of fractional Section 3, Township 24 South, Range 30 East, Louisiana Meridian, Louisiana; thence south 18,040 feet and west 14,000 feet to the true point of beginning, to wit, the southwest corner of the SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 3, Township 25 South, Range 30 East; thence east along the south boundary line of the SE $\frac{1}{4}$ NW $\frac{1}{4}$ of said Section 3 a distance of 990 feet, more [fol. 224f] or less, to the intersection of said boundary line and the low water mark of the right descending bank line of Southwest Pass; thence in a southwesterly direction along the low water line of the right descending bank of Southwest Pass, with the meanders thereof, a distance of 7,850 feet, more or less, to the point where said low water line intersects the south boundary line of the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 9, Township 25 South, Range 30 East; thence west along the south boundary line of the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 9 a distance of 190 feet, more or less, to the intersection of said line and the east shoreline of West Bay, Gulf of Mexico; thence northeasterly along the east shoreline of West Bay and the southeast top of bank line of that slough connecting Mud Bay, Gulf of Mexico, and West Bay, Gulf of Mexico, and which approximately parallels and lies just to the southeast of West Jetty, a distance of 7,540 feet, more or less, to the intersection of said top bank line and the south boundary line of the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 3, Township 25 South, Range 30 East; thence east along the south boundary line of the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of said Section 3 a distance of 930 feet, more or less, to the point of true beginning.

The land described as aforesaid is indicated and designated Tract D on the attached map. The said tract of land is estimated to contain an area of 221.05 acres, more or less.

TRACT E

Beginning at the southeast corner of fractional Section 3, Township 24 South, Range 30 East, Louisiana Meridian,

Louisiana; thence south 18,040 feet and west 15,320 feet to the true point of beginning, to-wit: the southwest corner of the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 3, Township 25 South, Range 30 East; thence east along the south boundary of the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of said Section 3 a distance of 290 feet, more or less, to the intersection of said line and the top of the northwest bank line of that slough connecting Mud Bay and West Bay, both of the Gulf of Mexico, said slough approximately paralleling and lying just southeast of West Jetty; thence in a southwesterly direction along the top of said bank line a distance of 3,430 feet, more or less, to a point in NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 9, Township 25 South, Range 30 East, said point being at the intersection of the aforementioned bank line and the east shoreline of West Bay, Gulf of Mexico; thence in a northerly direction along the east shoreline of West Bay, a distance of 1,620 feet, more or less, to its intersection with the south boundary line of the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 4, Township 25 South, Range 30 East, thence east along the south boundary line of NW $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 4 a distance of 400 feet, more or less, to the southeast corner of the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 4; thence north along the east boundary line of the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 4 a distance of 830 feet, more [fol. 224g] or less, to the top of the south bank line of Mud Bay; thence in generally a northeasterly direction along the top of said bank line, with the meanders thereof, a distance of 1,240 feet, more or less, to a point on the south boundary line of the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 4; thence east along the south boundary line of the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 4 a distance of 360 feet, more or less, to the true point of beginning.

The land described as aforesaid is indicated and designated Tract E on the attached map. The said tract of land is estimated to contain an area of 54.07 acres, more or less.

[fol. 1847]

IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

OPINION OF THE COURT—December 26, 1961

MacCracken, Collins & Whitney, Philip R. Collins, Courtney Whitney, Jr., Edmond G. Miranne, Attorneys for Patrick A. McKenna.

Cobb & Wright, Lloyd J. Cobb, Joseph V. Ferguson, II, William P. Hardeman, Percy Sandel, Attorneys for Pan American Petroleum Corporation.

Henican, James & Cleveland, C. Ellis Henican, Horace M. Holder, Attorneys for Floyd A. Wallis.

WRIGHT, District Judge:

These cases involve rights in a mineral lease covering about 830 acres on the oil-rich banks of Southwest Pass, one of the mouths of the Mississippi River, around the community of Burrwood in southernmost Louisiana. The common defendant, Wallis, holds his lease from the United [fol. 1848] States. He did not come by it without a fight.¹

¹ The history of his contest with Morgan, a prior applicant before the Department of the Interior, is a long one. There was an initial skirmish over the "acquired lands" filings, which Wallis lost. Then the terrain shifted to the "public domain" applications and Wallis succeeded in obtaining a preliminary ruling voiding Morgan's prior filing for technical defects. But Morgan did not acquiesce in defeat. An elaborate rehearing before the Director of the Bureau of Land Management delayed his final decision another year. Failing in that, Morgan appealed to the Secretary of the Interior. By this time Wallis had an additional opponent, Strom, a later applicant who claimed a superior description of the lands. From the Secretary's rejection of their claims, Morgan and Strom prosecuted an appeal to the United States District Court for the District of Columbia. Their motion for a preliminary injunction was denied and, on February 20, 1961, summary judgment was entered in

Nor is his title yet secure.² But even if his triumph be short-lived, Wallis wants to enjoy it alone. The claimants here would spoil that hope. They assert a right to share in his victory. McKenna is his alleged co-adventurer, who claims a one-third interest in the lease; Pan American Petroleum Corporation demands an assignment of the lease under an option contract. Wallis admits the agreements, but insists they relate to another venture which came to naught. The present lease, he maintains, is the fruit of a different venture in which the claimants have no part.

[fol. 1849] The chronology of this controversy begins in early 1954. Wallis uncovered the acreage in question, apparently land of the United States on which no application for a mineral lease had been filed. He promptly communicated his "find" to McKenna, who was handling other matters for him in Washington before the Department of the Interior. In the meantime, another applicant, Morgan, submitted a lease offer covering at least portions of the lands involved. But Wallis nevertheless prepared his applications, five in number, and they were filed on June 2. In their collaboration on this venture, Wallis and McKenna worked out an agreement,³ which was finally reduced to

favor of Wallis. *Morgan v. Udall*, D. D.C., Civil Action No. 3248-58, 2/20/61. The court is advised that an appeal from that decision is presently pending before the Court of Appeals for the District of Columbia.

² Besides the possibility of reversal on the pending appeal in the proceedings entitled *Morgan v. Udall*, supra, Wallis must ultimately face the claim of the State of Louisiana in separate proceedings before this court. *State of Louisiana v. Floyd A. Wallis, et al.*, E.D. La., Civil Action No. 9046. In that suit, Louisiana asserts title to the land involved here and disputes the right of the United States to grant a lease covering that acreage.

³ Agreement was actually reached in a telephone conversation on March 18, 1954. However, relating as it did to immovables, that oral understanding did not then bind the parties. See Note 13, infra. Even now, though admitted under oath, it probably has no force in view of the requirement of "actual delivery" in verbal contracts affecting immovables. La. C.C., Art. 2275. But, in any

writing in a letter from Wallis dated December 27, 1954, approved by McKenna on January 3, 1955. Specifically referring to the applications already filed, the letter agreement recognizes in McKenna a one-third interest in those applications and in any lease to be issued thereunder.⁴

[fol. 1850] Three months later, after swift negotiations, Wallis, acting alone,⁵ granted Pan American an option to acquire any lease issued to him pursuant to the still pending applications.

At this point, and for some months yet, everyone concerned⁶ assumed the acreage in question was "acquired land" of the United States,⁷ being apparently accretion to a tract purchased by the Department of the Army from a

event, since the date is not crucial and the oral contract is admitted only to the extent incorporated in the December 27 letter, we may rely on the written document as evidencing the agreement between the parties.

⁴ In view of the disposition here made, it is unnecessary to decide whether the agreement created a joint venture, or is more properly characterized as an agency coupled with an interest in view of the provision granting Wallis sole management of the undertaking. See Note 5, *infra*. In any case, as Wallis admits, the agreement was effective to transfer to McKenna an interest in the then pending applications and any lease issued thereunder.

⁵ No question is raised as to Wallis' authority to contract alone with respect to such a lease in view of the stipulation in his agreement with McKenna that "all dealings in connection with these leases shall be at [Wallis'] sole discretion and direction." McKenna complains only of Wallis' alleged misrepresentations touching on the execution of the option contract and his failure to share the \$8,300 option payment received from Pan American.

⁶ While Pan American's attorney in the option transaction, Sandel, claims to have adverted to the possibility that the acreage in question might be classified as public domain land of the United States, the evidence is clear that he personally believed it was acquired land.

⁷ "Acquired land," as the term implies, is land obtained by the United States through purchase or other transfer from a state or a private individual and normally dedicated to a specific use. Land owned by the United States by virtue of its sovereignty is called "public domain land."

[fol. 1851] Louisiana patentee.⁸ Wallis had sought a lease under the Mineral Leasing Act for Acquired Lands, 30 U.S.C. §351 et seq., which applies only to such lands.⁹ He had filed applications which would be ineffective if, as happened, the acreage were ultimately determined to be public land.¹⁰ Neither McKenna nor Pan American demurred. On the contrary, both actively supported the acquired lands theory. It was only in late 1955 or early 1956¹¹ that Wallis began to doubt he had guessed right about the character

⁸ The acreage in question is contiguous to a tract patented to Jergens by the State of Louisiana in 1898 and 1903, and sold by him in the latter year to the United States. The assumption of the parties apparently was that the area covered by the applications, being river alluvion formed by accretion or dereliction after this transaction, inured to the United States, as the then owner of the banks, see, La. C.C., Arts. 509, 510, under the same title as it held the banks, i.e., as "acquired lands." Ultimately, the Director of the Bureau of Land Management, whose conclusions were affirmed by the Secretary of the Interior and also, apparently, by the District Court for the District of Columbia, determined that title to the Jergens tract never passed to the State of Louisiana, but that it was a "mud lump" which, together with all accretions thereto, including the present acreage, always was, and remains, public domain land of the United States.

⁹ The original Mineral Leasing Act of 1920, 30 U.S.C. §181 et seq., with certain exceptions not here relevant, applied only to public domain lands. See *Justheim v. McKay*, D. D.C., 123 F.Supp. 560, aff'd, 97 U.S. App. D.C. 146, 229 F.2d 29. Enacted to remedy this deficiency, the 1947 Act in terms applies only to "acquired lands" not subject to lease under the 1920 statute. 30 U.S.C. §§351, 352. See *McKenna v. Seaton*, 104 U.S. App. D.C. 50, 259 F.2d 780, 781, n.1.

¹⁰ The parties all agree on this point. *Seaton v. Texas Company*, 103 U.S. App. D.C. 163, 256 F.2d 718, must be restricted to its peculiar facts.

¹¹ A dispute rages between McKenna and Wallis as to whether the realization that the land might be characterized as public domain resulted from one or another of two conferences held at the Department of Interior, or originated with Edelstein, the new attorney retained by the parties. But it is unnecessary to resolve this conflict since the discovery, by mutual accord, occurred no sooner than November, 1955, nor later than February, 1956.

of the land.¹² Then, on the advice of new counsel, he submitted another application for the same tract under the "public domain lands" Mineral Leasing Act, 30 U.S.C. §181 et seq. No new written agreements were entered into, nor [fol. 1852] were the old instruments amended. The question presented is whether McKenna and Pan American nevertheless acquired rights in the lease ultimately issued to Wallis under this fresh public domain application.

The issue is very narrow under the Louisiana rule that all "contracts applying to and affecting" "oil, gas, and other mineral leases" must be reduced to writing, La.C.C., Arts. 2275, 2440, 2462, via La.R.S. 9:1105.¹³ Having failed to ob-

¹² At the very outset, Wallis had apparently considered the acreage involved public domain land. But he quickly abandoned that position and accepted the view that it was acquired land, without further question until the end of 1955.

¹³ While the legislative declaration that rights in mineral leases are "real rights and incorporeal immovable[s]," L.R.S. 9:1105, has not always been given full effect, see, e.g., *Reagan v. Murphy*, 235 La. 529, 105 So.2d 210; *Tinsley v. Seismic Explorations, Inc.*, 239 La. 23, 117 So.2d 897; *Hodges v. Long-Bell Petroleum Company*, 240 La. 198, 121 So.2d 831 (on rehearing); *Harwood Oil & Mining Company v. Black*, 240 La. 641, 124 So.2d 764, the Louisiana Supreme Court has been consistent in reading §1105 as requiring that contracts affecting such rights comply with the statute of frauds. *Arkansas Louisiana Gas Co. v. R. O. Roy & Co.*, 196 La. 121, 198 So. 768; *Davidson v. Midstates Oil Corporation*, 211 La. 882, 31 So.2d 7; *Wier v. Glassell*, 216 La. 828, 44 So.2d 882; *Acadian Production Corp. of Louisiana v. Tennant*, 222 La. 653, 63 So.2d 343. The rule applies to McKenna's agreement, whether it is considered as creating a joint venture or an agency relationship. See *Stock v. DeSoto Properties*, 221 La. 384, 59 So.2d 428, 430-431; La.C.C., Art. 2992. So does it apply to Pan American's option contract. La.C.C., Art. 2462.

Since the requirement that such contracts be in writing may affect the very existence of a cause of action or, at least, significantly affect the result, the Rule of Decision Act, 28 U.S.C. §1652, as interpreted in *Guaranty Trust Co. v. York*, 326 U.S. 99, compels adherence to the local law, in disregard of the more liberal policy of F.R.Civ.P., Rule 43(a). *Macias v. Klein*, 3 Cir., 203 F.2d 205; cf. *Kossick v. United Fruit Co.*, 365 U.S. 731. See also, *Zacharie v. Franklin*, 37 U.S. (12 Peters) 151; *Grafton v. Cummings*, 99 U.S. (9 Otto) 100; *Moses v. Lawrence County Bank*, 149 U.S. 298.

tain new written agreements,¹⁴ each of the plaintiffs is compelled to rely on a single instrument. McKenna's claim is [fol. 1853] imprisoned in the letter agreement of December 27, 1954—January 3, 1955; Pan American's claim is confined to the language of the March 3, 1955 option. Except as it throws light on their original intent, the conduct of the parties after those dates is irrelevant. Any new understandings reached in 1956, 1957, 1958 or 1959 are unenforceable in the absence of a writing. Nor does it matter whether Wallis obtained his lease by breaching his trust, as alleged. If the claimants acquired an interest in the lease, it is under the written instruments, not by virtue of any subsequent estoppel.¹⁵ Accordingly, we turn to those instruments.

The letter which incorporates the agreement between Wallis and McKenna, after particularly listing and identifying certain numbered lease applications, being those

¹⁴ Despite repeated contacts with him during three and a half years preceding issuance of the lease, Pan American claims not to have known about the new application filed by Wallis, and, accordingly, says it had no occasion to ask for revision of its option contract. But such knowledge is, of course, irrelevant. Pan American is not here penalized for negligence. Either the original agreement applies to the lease issued, in which case no amendment was necessary; or it does not, in which case Wallis might properly have refused to revise the contract. McKenna, on the other hand, knowing of the new application, immediately sought from Wallis written confirmation of his interest in any lease that might issue thereunder. The very next day after it was filed he transmitted to Wallis for execution a power of attorney covering the public domain application which acknowledged his supposed interest. Wallis refused to sign the instrument and shortly "discharged" McKenna.

¹⁵ See *Scurto v. LeBlanc*, 191 La. 136, 184 So. 567; *Pan American Production Co. v. Robichaux*, 200 La. 666, 8 So.2d 635; *Wier v. Glassell*, supra; *Blevins v. Manufacturers Record Publishing Co.*, 235 La. 708, 105 So.2d 392, 414 (on rehearing), and cases there cited. Of course, if Wallis did in fact breach his agreements, he may be answerable in damages or compelled to make restitution. La.C.C., Arts. 1926, 1928, 1930-1934. But neither dissolution of the contracts, nor damages, are prayed for here. This is a suit for specific performance only.

filed by Wallis under the Mineral Leasing Act for Acquired Lands, confirms in McKenna "a $\frac{1}{3}$ undivided interest in the above captioned oil and gas lease applications * * * [and] such lease or leases as may be issued * * * under these captioned applications * * *" (emphasis added). Similarly the agreement with Pan American recites the [fol. 1854] same five pending applications and grants the company "the right and option * * * to acquire any and all oil and gas leases which may be issued * * * under and by virtue of the above referred to applications. (Emphasis added.) Much is made of a second paragraph of the option agreement where Wallis promises, in general terms, to "make diligent efforts" to obtain a lease over the lands covered by the applications. But that provision does not purport to enlarge the scope of the grant.¹⁶ Thus, both instruments speak exclusively of an acquired lands lease. Was this an oversight?

With scant excuse,¹⁷ the court permitted parol evidence [fol. 1855] to show the true intent of the contracting par-

¹⁶ Paragraph II of the option contract reads:

"Wallis agrees to make diligent efforts to acquire leases on, to acquire the right to lease all lands described in the above referred to applications and to obtain the issuance of leases to him covering all of said lands."

Standing alone, this provision would convey nothing. It merely imposes an additional duty, supplementing the fundamental obligation recited in the first paragraph. Nor does it throw light on the subject matter of the contract. On the contrary, being a mere accessory stipulation, its apparently general terms must be considered qualified by paragraph I, which indicates precisely "the things concerning which * * * the parties intended to contract." La.C.C., Arts. 1959, 1961. See *State ex rel. Ditch v. Morgan's Louisiana & T.R. & S.S. Co.*, 111 La. 120, 35 So. 482, *Dufrene v. Bernstein*, 195 La. 575, 197 So. 236. As to Sandel's claim with respect to paragraph II, see Note 18, *infra*.

¹⁷ The general rule, of course, is that, while extrinsic evidence is inadmissible when the words of the agreement are unambiguous, La.C.C., Arts. 1945(3), 1963, 2276, in case of doubt the court should consider what the parties said, or wrote, or did, in pursuance of their agreement. La.C.C., Arts. 1949, 1950, 1956. Here, the contracts may be thought unambiguous, but, in view of the

ties on the date the agreements were executed. But, not surprisingly, the documents and testimony produced only confirmed the indication of the written instruments that on January 3 and March 3, 1955, no one contemplated issuance of a lease to Wallis except in pursuance of the then pending acquired lands applications. That was all they talked about. And, quite naturally, that is all they put into their agreements.¹⁸ Doubtless, McKenna and Pan American were both anxious to have in *any lease* Wallis might obtain over these lands. At the time, however, they saw only one means of achieving that end. Had they anticipated the ultimate issuance of a public domain lease, perhaps they would have purchased an interest in that contingency too. But that is a futile speculation. Obviously they cannot be said to have intended to buy a share they did not even advert to. The conclusion must be that the written agreements faithfully

liberal rule adopted by the Louisiana courts, see *Plaquemines Oil & Development Co. v. State*, 208 La. 425, 23 So. 2d 171, 174; *Gulf Refining Co. v. Garrett*, 209 La. 674, 25 So. 2d 329, 338-339 (on rehearing); *Rosenthal v. Gauthier*, 224 La. 341, 69 So. 2d 367, 369; *Simmons v. Hanson*, 228 La. 440, 82 So. 2d 757, 758-759, and, in the absence of a jury, it seemed "a reasonable, common sense exercise of judicial discretion * * * to give the benefit of the doubt to the proponent of the offered evidence, in order to avoid a remand and retrial and in the interest of determining truth through trial." *J. B. Elkins v. Laura Stell Townsend*, 5 Cir., — F.2d — (11/17/61). See also, F. R. Civ. P., Rule 43(c).

¹⁸ Indeed, Wallis' letter to McKenna, which embodies their agreement, traces almost literally the language of McKenna's prior letter requesting written confirmation of his interest. Though Campbell, the Pan American agent who negotiated the option "deal" with Wallis, makes no such claim, Sandel, the attorney who drafted the contract, insists that paragraph II of the contract was inserted, *inter alia*, to cover the contingency that a public domain lease might be issued to Wallis, after the latter alerted him to that possibility by mentioning that Morgan had filed both types of application. But all the evidence, including Sandel's own correspondence, contradicts that assertion. Moreover, it is difficult to understand why the draftsman was not more explicit if apprized of the contingency and intending to provide for it. Under the circumstances, the allegations must be rejected. See La. C.C., Art. 1958.

record what was in the minds of the parties. Accordingly, there is no pretext for a strained construction or for reformation of the instruments. These instruments, taken [fol. 1856] alone or illumined by parol evidence, limit the claims of McKenna¹⁹ and Pan American to the acquired lands applications.

It may be true, as plaintiffs suggest, that the lease ultimately granted, pursuant to the public domain application, is, from the lessee's point of view,²⁰ no different than one issued under an acquired lands offer. But that decides nothing. For so might a lease acquired by Wallis from the state or by assignment from Morgan, had the latter prevailed, be in all respects identical to the one in suit. Yet, clearly, neither McKenna nor Pan American could properly assert any interest in a lease obtained in that way. The important fact here is that the lease in dispute resulted from a new filing, based on a new theory, which was governed by a different statute and processed under different regulations.²¹ The public domain application cannot be viewed [fol. 1857] as a mere amendment of, or substitute for, the

¹⁹ Insofar as McKenna performed services beyond the obligations of his contract which contributed to the eventual issuance of the public domain lease, he may be entitled to compensation on a quantum meruit basis, or under the theory of unjust enrichment. But that is no part of his prayer in the present proceeding.

²⁰ There are differences from the lessor's point of view. Compare, e.g., 30 U.S.C. §191 with 30 U.S.C. §355 with respect to the disposition of moneys received by the United States as lessor.

²¹ As already noted, lease of public domain lands is governed by the Mineral Leasing Act of 1920, 30 U.S.C. §181 et seq., while lease of acquired lands is governed by the Mineral Leasing Act for Acquired Lands of 1947. The latter statute adopts the rules and regulations for public lands leasing "to the extent that they are applicable," 30 U.S.C. §359, but, as a matter of fact, the regulations promulgated by the Secretary of the Interior are very different. Compare, e.g., 43 C.F.R. §192.42-192.42a with 43 C.F.R. §200.5-200.8. The particularity with which the acquired lands applications are listed and described in the instruments in suit demonstrates that the parties themselves were aware of this difference and appreciated its importance.

old offers. It stands on its own feet, holding its own priority. And the new filing in no way cancelled or superseded the earlier applications. In effect, Wallis had two irons in the same fire, in only one of which McKenna and Pan American held an interest.

In short, in the administrative view, at least, the lease in question is wholly unconnected with the original acquired lands applications. Tempted as it might be to disregard technicalities, even a court of equity must recognize as a reality administrative rules and regulations which so vitally affect valuable rights.²² Thus, here, the distinction made between acquired lands leases and public domain leases cannot be ignored, and the lease issued must be viewed as the fruit of a fresh undertaking, separate and apart from the venture in which the claimants had a part. It follows that, whatever remedies they may have in separate proceedings, if Wallis dealt unfairly with them,²³ neither McKenna nor Pan American acquired any interest in the lease in suit.²⁴

Decree accordingly.

J. Skelly Wright, United States District Judge.

New Orleans, Louisiana, December 26, 1961.

²² As Judge Hart observed during the hearing of *Morgan v. Udall*, supra: "These things get plumb technical." But, just as he did, so must this court give due weight to the administrative regulations, no matter how technical they may appear.

²³ See Notes 15 and 19 supra.

²⁴ Disposition on the ground stated renders moot the other factual and legal issues raised. Accordingly, no finding is entered with respect to McKenna's alleged misrepresentation of his qualifications to practice before the Department of the Interior or his alleged failure to fulfill the obligations assumed under his contract with Wallis, and no conclusion is reached with respect to Pan American's apparent failure to exercise its option in writing. Nor is there any occasion to reconsider the preliminary rulings entered by order dated September 13, 1960, on Wallis' motion to dismiss.

[fol. 1895]

IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

JUDGMENT—January 18, 1962

These matters having come on before the court without a jury and the court having heard and considered all of the testimony and evidence submitted on behalf of the respective parties and being of the opinion that (1) the defendants, Floyd A. Walis and Pan American Petroleum Corporation, in Civil Action 8904-B are entitled to have the relief sought by Patrick A. McKenna denied; and (2) the defendant, Floyd A. Wallis, in Civil Action 8937-B is entitled to have the relief sought by Pan American Petroleum Corporation denied; and for the written reasons filed herein on December 26, 1961:

It Is Adjudged and Declared:

(1) That Patrick A. McKenna does not have the right to be recognized as the owner of an undivided $\frac{1}{3}$ interest in Federal Oil and Gas Lease BLM-042017 issued to Floyd A. Wallis by the Secretary of the Interior on December 18, 1958, effective as of January 1, 1959.

(2) That the agreement dated March 3, 1955, by and between Floyd A. Walis and the Stanolind Oil & Gas Company (now Pan American Petroleum Corporation) and duly registered in the Parish of Plaquemines, Louisiana, on January 16, 1959, and now appearing in COB 212, Folio 359, of the Records of said Parish, does not cover or pertain to the Federal Oil and Gas Lease BLM-042017 issued to Floyd A. Wallis; and, therefore, the demand of Pan American Petroleum Corporation to require Floyd A. Wallis to specifically perform his alleged obligations under [fol. 1896] the said agreement dated March 3, 1955 (and

to transfer by formal assignment to Pan American Petroleum Corporation all of his right, title and interest in and to the aforescribed lease, reserving to the said Floyd A. Wallis the overriding royalty interest described in said option agreement, all conditioned upon the discharge by Pan American Petroleum Corporation of its obligations to pay the consideration provided for in said option agreement) be, and it is hereby denied.

(3) That the said option agreement between Floyd A. Wallis and Pan American Petroleum Corporation dated March 3, 1955, is effective with respect to Federal Oil and Gas Lease Applications BLM-A 037435 through 037439 and any lease issued thereunder.

(4) Accordingly, except as provided in paragraph (3), all relief demanded by Patrick A. McKenna in Civil Action 8904-B and by Pan American Petroleum Corporation in Civil Action 8937-B is hereby denied.

(5) That (a) the Notice of Lis Pendens filed on behalf of Patrick A. McKenna, plaintiff in Civil Action 8904-B, in the records of the Parish of Plaquemines, Louisiana, on May 15, 1959, and now appearing in MOB 40, Folio 140, of said Parish; and (b) the Notice of Lis Pendens filed on behalf of Pan American Petroleum Corporation (formerly Stanolind Oil and Gas Company), plaintiff in Civil Action 8937-B, in the Records of the Parish of Plaquemines, Louisiana, on April 3, 1959, and now appearing in MOB 39, Folio 615, of said Parish be, and they are hereby, ordered erased and cancelled and the Clerk of Court and Ex Officio [fol. 1897] Recorder for the Parish of Plaquemines, Louisiana, is hereby authorized and directed to cancel the said inscriptions and to place a notation of this decree in the margin of the original entry of each said notice.

(6) Floyd A. Wallis and Pan American Petroleum Corporation, defendants in Civil Action 8904-B, and Floyd A. Wallis, defendant in Civil Action 8937-B, shall have the

right to recover all taxable costs from the plaintiff in each said action.

(7) In accordance with the views expressed in the written reasons of December 26, 1961, whatever, if any, rights Patrick A. McKenna and/or Pan American Petroleum Corporation might otherwise have against Floyd A. Wallis, including such rights as may exist for damages and/or restitution, are hereby reserved.

Dated at New Orleans, Louisiana, this 18th day of January, 1962.

J. Skelly Wright, United States District Judge.

N.B. Though not specifically prayed for, the relief granted in paragraph (3) is accorded under F.R.Civ.P., Rule 54(c). Since no acquired lands lease has yet issued, and Pan American has accordingly not been called upon to exercise its option with respect thereto, the reserved question whether timely exercise in writing is required under the circumstances does not now affect this portion of the judgment.

The same relief cannot be accorded McKenna since the issues relating to his alleged misrepresentation of his qualifications to practice before the Department of the Interior and his alleged failure to fulfill the obligations assumed under his contract with Wallis were left open by the Court's opinion. See Opinion, note 24.

No declaration is made with respect to the rights of either plaintiff in Federal Oil and Gas Application BLM-042112 filed in the name of T. Miller Gordon or any lease issued thereunder because that issue was not tendered and may not have been fully litigated.

S/ J S W

[fol. 1977] Minute Entry of Argument and Submission—January 15, 1963 (omitted in printing).

[fol. 1978]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 19631

PATRICK A. McKENNA, Appellant,

versus

FLOYD A. WALLIS and PAN AMERICAN PETROLEUM
CORPORATION, Appellees.

PAN AMERICAN PETROLEUM CORPORATION, Appellant,

versus

FLOYD A. WALLIS, Appellee.

Appeals from the United States District Court for the
Eastern District of Louisiana.

OPINION—January 21, 1964

Before Rives and Wisdom, Circuit Judges, and Bootle,
District Judge.

Rives, Circuit Judge: These actions, involving common questions of law and fact, were consolidated in the district [fol. 1979] court and decided pursuant to an opinion reported at 200 F.Supp. 468. They involve rights asserted separately by Patrick A. McKenna and Pan American Petroleum Corporation in an oil and gas lease from the United States to Floyd A. Wallis covering 826.87 acres of exceedingly rich "mud lumps" at the mouth of the Mississippi River in Plaquemines Parish, Louisiana.

The lease was issued to Wallis on December 19, 1958, effective January 1, 1959. The lease was of public domain

land, that is land in which title vested in the United States because of its sovereignty pursuant to the Mineral Leasing Act of 1920, now appearing as Title 30, U.S.C.A. §181, et seq., as distinguished from acquired land, that is land which was once privately owned and then acquired by the United States, the leasing of which is pursuant to the Mineral Leasing Act for Acquired Lands of August 7, 1947, now appearing as Title 30, U.S.C.A. §351, et seq.

The claims both of McKenna and of Pan American were based upon events occurring prior to the issuance of the lease to Wallis. McKenna claimed that Wallis and he were joint venturers in acquiring the lease, and that he was entitled to an undivided one-third interest in the lease. Pan American claimed that Wallis had entered into an agreement granting Pan American the option to acquire the lease thereafter issued to Wallis. The district court decided that neither McKenna nor Pan American acquired any interest in the lease upon what the court referred to as a very narrow issue, saying:

"The issue is very narrow under the Louisiana rule that all 'contracts applying to and affecting' 'oil, [fol. 1980] gas, and other mineral leases' must be reduced to writing. LSA-C.C. Arts. 2275, 2440, 2462, via LSA-R.S. 9:1105. Having failed to obtain new written agreements, each of the plaintiffs is compelled to rely on a single instrument. McKenna's claim is imprisoned in the letter agreement of December 27, 1954-January 3, 1955; Pan American's claim is confined to the language of the March 3, 1955 option. Except as it throws light on their original intent, the conduct of the parties after those dates is irrelevant. Any new understandings reached in 1956, 1957, 1958 or 1959 are unenforceable in the absence of a writing. Nor does it matter whether Wallis obtained his lease by breaching his trust, as alleged. If the claimants acquired an interest in the lease, it is under the written instruments, not by virtue of any subsequent estoppel."

McKenna v. Wallis, E.D. La. 1961, 200 F.Supp. 468, 471, 472.

We think that the district court committed fundamental error in applying Louisiana statutes and law to determine rights in a lease on public domain land which were and are subject only to the sovereignty of the United States. The principle as to which law, state or federal, applies was stated long ago in *Wilcox v. McConnell*, 1839, 38 U.S. (13 Peters) 498, 516:

"We hold the true principle to be this, that whenever the question in any court, state or federal, is, whether [fol.1981] a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States; but that whenever, according to those laws, the title shall have passed, then that property, like all other property in the state, is subject to the state legislation; so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States."

Subsequent decisions have made it clear that "title" as used in that principle includes not only the legal title, but also the equitable title, indeed, the entire bundle of rights going to make up ownership. Whether the lease from the United States to Wallis was in part for the benefit of McKenna or of Pan American or of both are questions to be determined by federal law.

Irvine v. Marshall, et al., 1858, 61 U.S. (20 How.) 558, requires the application of federal law until both legal and equitable titles have passed from the United States. The United States was not a party to that litigation, but the Court recognized in clear and unmistakable terms that the United States owed a duty, to be performed both through its General Land Office and through its federal courts, to see that the equitable title as well as the legal title to public lands was vested in the proper person who proved his right under the federal law. The opinion em-

[fol. 1982] phasized the doctrine of resulting trusts which may have application to the facts of this case:

"With respect to resulting trusts, and the jurisdiction and duty of the courts of the United States to enforce them, the opinion of this court has been emphatically declared; and so declared in a case of peculiar force and appositeness, because it related to the acts of an agent in the entry and survey of lands, and is in its principal features essentially the same with the cause now under consideration. We allude to the case of *Massie v. Watts*, reported in the 6th vol. of *Cranch*, p. 143. This was a suit in equity in the Circuit Court of the United States for the district of Kentucky, to compel the conveyance of land from an agent to his principal, upon the ground that the agent had withdrawn an entry on lands made in the name of his principal, had caused an entry and survey to be made in his own name, and had thereby obtained a legal title to this land. In decreeing the relief sought by the complainant, this court, expounding the law by the Chief Justice (pp. 169, 170), said: 'If *Massie* (i.e., the agent) really believed that the entry of *O'Neal* (his principal), as made, could not be surveyed, it was his duty to amend it, or to place it elsewhere. But if in this he was mistaken, it would be dangerous in the extreme—it would be a cover for fraud which could seldom be removed, if a locator al-[fol. 1983] leging difficulties respecting a location might withdraw it, and take the land for himself. But *Massie*, the agent of *O'Neal*, has entered the land for himself, and obtained a patent in his own name. According to *the clearest and best-established principles of equity*, the agent who so acts becomes a *trustee* for his principal. He cannot hold the land under an entry for himself, otherwise *than as a trustee for his principal*.' This exposition of the equity powers of the courts of the United States as applicable to resulting trusts—a power inseparable from the cognizance over

frauds, one great province of equity jurisprudence—is conclusive.

“With respect to the power of the Federal Government to assert, through the instrumentality of its appropriate organs, and administration of its constitutional rights and duties, and with regard to such an assertion as exemplified in the management and disposition of the public lands, and the titles thereto, the interpretation of this court has been settled too conclusively to admit of controversy.” 61 U.S. at 565, 566.

The principles of law announced in repeated opinions of the Supreme Court seem to us clearly to lead to the conclusion that as to the original patent, lease or other grant from the United States, federal law controls in determining title in its broadest sense, including strictly legal title, trust rights and any and all equitable or beneficial interests. *Gibson v. Chouteau*, 1871, 80 U.S. (13 Wall.) 92, 101, 102; *Sparks v. Pierce*, 1885, 115 U.S. 408, 413; *Van Bracklin v. State of Tennessee*, 1886, 117 U.S. 151, 168; *Widdicombe v. Childers*, 1888, 124 U.S. 400, 405;¹ *Felix v. Patrick*, 1892, 145 U.S. 317, 328; *United States v. Colorado Anthracite Co.*, 1912, 225 U.S. 219, 223; *Buchser v. Buchser*, 1913, 231 U.S. 157, 161; *Ruddy v. Rossi*, 1918, 248 U.S. 104, 106, 107; see also other cases cited in 73 C.J.S. Public Lands, §209, and 42 Am.Jur., Public Lands, §37.

Indeed the same principle was recognized by the Supreme Court of Louisiana in the early case of *Kittridge v. Breaud*, La. 1843, 39 Am. Dec. 512, as follows:

¹ In that case, Widdicombe had got his patent but was held to be a purchaser in bad faith, the Court saying: “The holder of a legal title in bad faith must always yield to a superior equity. As against the United States his title may be good, but not as against one who had acquired a prior right from the United States in force when his purchase was made under which his patent issued. The patent vested him with the legal title, but it did not determine the equitable relations between him and third persons.” 124 U.S. at 405.

"And the principle is well recognized in our jurisprudence, as well as in that of the courts of the United States, that where an equitable right, which originated before the date of the patent, whether by the first entry or otherwise, is asserted, it may be examined into: *Brush v. Ware*, 15 Pet. 93; *Bouldin v. Massie*, 7 Wheat. 149."

The Mineral Leasing Act itself makes clear that, as a part of the public policy of the United States directed at opposing the monopoly of federally-owned mineral deposits, the Bureau of Land Management must examine into the qualifications of the real lessee and of any assignee of a mineral lease or of a part interest. See sections 181 and 184 of 30 U.S.C.A. Those provisions leave no room for operation of any State law.

The same result must be reached if we follow through on the logical views expressed by the Director of the Bureau of Land Management of the United States Department of Interior in his decision sustaining Wallis' application to lease as public domain land the acreage here involved:

"What Law Then is to Control?"

"It is said in *United States v. Louisiana*, *supra* [1949, 339 U.S. 669], and *United States v. California*, *supra* [1946, 332 U.S. 19], that the resources in and under subaqueous soil of the sea are an incident to the paramount rights and power of the United States over the marginal sea; therefore, that power must be *paramount to any other power* in disposing of those resources. Since it was held that the United States had the paramount power over and Louisiana did not have title to the marginal sea, then Louisiana must not have had a basis for legislative jurisdiction to dispose of the subaqueous soil or resources even though the United States may not have acted or entered the field. If Louisiana did not have the necessary contacts

to establish a sufficient basis for legislative jurisdiction, how could any State real property law apply? [fol. 1986] The legislation and judicial decrees of a State can only apply to persons and things over which the State has jurisdiction. *Gibson v. Chouteau*, 13 Wall. 92, 99 (U.S. 1871).

"There is a strong presumption that any statute is to be construed *prima facie* territorial in effect. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357 (1908). This lack of jurisdiction is based upon the proposition that a State does *not* have the power to deny the paramount authority of the United States over the marginal sea, *United States v. Louisiana*, *supra*; '(c)alifornia, like the thirteen original colonies, never acquired ownership in the marginal sea. * * *,' *Id.*, 704; this power, or rather lack of it, has no relation to the power of a State to use or regulate the marginal sea absent conflicting Federal policy, and the question is open so far as the power of a State to extend or establish its external territorial limits *vis à vis* persons other than the United States or those acting on its behalf are concerned. *Id.*, 705. Nothing is apposite in *Manchester v. Massachusetts*, 139 U.S. 240 (1891) (inland waters); *The Abby Dodge*, 223 U.S. 166 (1912); or *Skiriotes v. Florida*, 313 U.S. 69, 75 (1940) (both cases involve power of a State over her citizens), for there is quite obviously a great difference between the exercise of police power, within or without the territorial boundaries of a State and the proprietary rights in land within those same boundaries. *Utah Power & Light Co. v. United States*, 243 U.S. 389, 404 (1914). The Department has taken the position that the boundary of the State of Louisiana prior to the date of the Submerged Lands Act of May 22, 1953 (67 Stat. 29; 43 U.S.C., secs. 1301-1315) was at the low water mark of the Gulf of Mexico and at that point marked by the separation of the inland waters from the

open sea. *Solicitor's Opinion*, M-36239 (October 1, 1954). *United States v. Louisiana, supra*, implies this result. It is my opinion, based upon the above-cited authorities and analysis, that State real property law never applied to any of the subaqueous soil seaward of the inland waters within the former boundary of the State of Louisiana.

"Is State law controlling or applicable in grants and title questions involving public lands of the United States? It is a principle of law that a State cannot by legislative fiat decree a forfeiture of the public lands of the United States and proclaim title in herself. *United States v. Oregon*, 295 U.S. 1, 29 (1934). This is based upon the rule that Federal questions cannot be ultimately decided by State tribunals. *Brewer-Elliott Oil & Gas Co., et al. v. United States, et al.*, 260 U.S. 77, 87 (1922). Thus, the courts of the United States will construe the grants from the United States [fol. 1988] without reference to the rules of construction adopted by the States for their own grants. *Packer v. Bird*, 137 U.S. 661 (1891); *Shively v. Bowlby*, 152 U.S. 1, 44 (1893). *United States v. Utah*, 283 U.S. 64, 75 (1930), states that '(s)tate laws cannot affect titles vested in the United States.' For example, the question of navigability is a Federal question, *United States v. Utah, supra*, 75; consequently, when the United States is disposing of a portion of its public domain, State law can no more affect the original paramount title of the United States which involves construction of one of its grants than could a State court or legislature pronounce a stream navigable with binding effect which the courts of the United States found to be non-navigable. *United States v. Oregon, supra*, 29; *Oklahoma v. Texas*, 258 U.S. 574, 583, 591 (1922). While the 'public land' States possess certain jurisdictional police powers over public lands of the United States situated within the State's boundaries, *McKelvey v. United*

States, 260 U.S. 253, 258 (1922), those States have no basis for jurisdiction to legislate or otherwise affect title paramount to the public lands of the United States, and State real property law could in nowise divest or delimit the rights and expectations of the United States in its public lands as known at common law which is the general law followed by the courts of the United States."

[fol. 1989] We would intimate no opinion as to who may ultimately be entitled to prevail in this litigation. In our opinion, the judgment should be vacated and the cause remanded for re-trial upon the evidence already taken and any additional relevant evidence, and for full and complete findings of fact and conclusions of law on all issues under the applicable principles of federal law.

Vacated and Remanded.

WISDOM, Circuit Judge, dissenting:

I respectfully dissent:

In this case there is much to be said for drawing on the "federal common law" to determine the rights of the parties. After all, the parties claim under a lease from the United States. And, in the matter of equitable remedies, the law of the forum here differs importantly from the law of the rest of the States: the civil law does not recognize resulting trusts or constructive trusts, not at least as these great tools of justice are effectively used in the common law to rectify the effects of bad faith.

But I can find no escape from the consequences of the fact that title to the lease in question passed from the United States to Wallis.

With due deference, it seems to me that *Irvine v. Marshall* does not compel an application of federal common law rather than the law of the forum. In that case no patent had yet issued to either the plaintiff or the defendant, and

[fol. 1990] it was held that a state or territorial law could not be invoked to force the issuance of a certificate of title to one or the other of two competing parties. The Supreme Court recognized, however, that an entirely different rule would apply *once legal title had in fact passed from the United States*:

"We hold the true principle to be this: that whenever the question in any court, State or Federal, is whether a title to land which was once the property of the United States has passed, that question must be resolved by the laws of the United States; but that whenever, according to those laws, the title shall have passed, then the property, like all other property in the State, is subject to state legislation, so far as that legislation is consistent with the admission, that the title passed and vested according to the laws of the United States."

Here, the United States transferred all of its lease interest to Wallis. On December 19, 1958, the Department of the Interior issued a public domain lands lease to Wallis over a prior applicant, Morgan, whose bids did not contain a sufficient description of the land. After appeals to the district court and Court of Appeals for the District of Columbia, Morgan's contentions were rejected and Wallis's right to the government lease became final. *McKenna v. Seaton*, D.C. Ct. App. 1958, 259 F.2d 780, *cert. den'd* 358 U. S. 835, 79 S. Ct. 57, 3 L. Ed. 2d 71; *Morgan v. Udall*, D.C. Ct. App. 1962, 306 F.2d 801, *cert. den'd* 371 U. S. 941, [fol. 1991] 83 S. Ct. 320, 9 L. Ed. 2d 275.

The case before the Court concerns a mineral lease and not a patent, but *Pan American Corporation v. Pierson*, 10 Cir. 1960, 284 F.2d 649, *cert. den'd* 366 U. S. 936, makes it clear that there is no distinction between a patentee and a lessee of a mineral lease, as far as passage of title to the mineral is concerned:

"We deem it unnecessary to delve into the legal complexities as to whether an oil and gas lease grants a profit a prendre or creates an estate in land. Under the first theory the lessee gains title to the oil and gas after its severance and under the second the lessee has an ownership of the hydrocarbons in place. Under each theory the government, by the issuance of the lease, has performed the last act required of it to vest in the lessee the right to explore for, produce, market and sell the oil and gas underlying the leased premises."

Some of the decisions relied upon by the majority may be distinguished on the facts from this case. Thus, *Widdicombe v. Childers*, 1888, 124 U. S. 400 and similar cases are distinguishable in that the claimant "had acquired a prior right from the United States in force when his purchase was made under which his patent issued". There is no question here, as there was in *United States v. Louisiana*, 1949, 339 U. S. 669 and *United States v. California*, 1946, 332 U. S. 19, of the paramount power of the United States over the marginal sea. The issue is not one involving [fol. 1992] the State's assertion of jurisdiction. There is no interference here with any overriding national interest. As in *Bank of America National Trust & Savings Association v. Parnell*, 1956, 352 U. S. 29, 77 S. Ct. 119, 1 L. Ed. 2d 93, this litigation between private parties does not intrude upon national policy or the rights of the United States. When leasing its lands to individuals, unless there are special circumstances, the government acts in a proprietary capacity in the same way as does the private land owner. *Campfield v. United States*, 1897, 167 U. S. 518, 524.

If the law of the forum controls, as I think it does, although "the jurisprudence of this State has fluctuated in construing a mineral lease as being in essence a real right or a personal right, it has been consistent to the effect that the transfer of an interest in a mineral lease cannot be made the subject of a verbal agreement and cannot be

proved by parol evidence." *Hayes v. Muller*, La. App. 1962, 146 So. 2d 176, 179; certified to Supreme Court and affirmed. Louisiana law, therefore, does not allow McKenna to prove his claim to a one-third interest in the title to the lease or allow Pan American to go beyond the terms of the option agreement. Whatever rights McKenna may have to an accounting for the profits resulting from a joint venture (see *Hayes v. Muller*), or otherwise, he cannot prove title to an interest in the lease itself by parol evidence. And whatever rights Pan American may have for damages for Wallis's breach of covenant "to make diligent efforts" to accomplish the purpose of the option, the parol evidence [fol. 1993] rule bars a court enforced conveyance of a lease not covered by the option.

I would affirm the judgment of the district court, without prejudice to the plaintiffs' rights, if any, to bring new and different actions, not based on McKenna's claim to a one-third interest in the title to the lease and not based on Pan American's claim to specific performance of the option.

[fol. 1994]

Extract From the Minutes of January 21, 1964

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1962

No. 19631

D. C. Docket No. 8904

PATRICK A. MCKENNA, Appellant,

versus

FLOYD A. WALLIS and PAN AMERICAN PETROLEUM
CORPORATION, Appellees.

PAN AMERICAN PETROLEUM CORPORATION, Appellant,

versus

FLOYD A. WALLIS, Appellee.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before Rives and Wisdom, Circuit Judges, and Bootle, District Judge.

JUDGMENT—January 21, 1964

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, vacated; and that said cause be, and it is hereby remanded to the said District Court for re-trial upon the evidence already taken and any additional relevant evidence, and for full and complete findings of fact and conclusions of law on all issues under the applicable principles of federal law, in accordance with the opinion of this Court;

It is further ordered and adjudged that the appellee, Floyd A. Wallis, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

“Wisdom, Circuit Judge, dissenting”

Issued as Mandate:

[fol. 1995]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19631

PATRICK A. McKENNA, Appellant,*versus*FLOYD A. WALLIS and PAN AMERICAN PETROLEUM
CORPORATION, Appellees;

PAN AMERICAN PETROLEUM CORPORATION, Appellant,*versus*

FLOYD A. WALLIS, Appellee.

Appeals from the United States District Court for the
Eastern District of Louisiana.

PETITION OF FLOYD A. WALLIS FOR REHEARING—
Filed February 10, 1964

Floyd A. Wallis, appellee in each one of these consolidated cases, respectfully petitions this Honorable Court for a rehearing of the appeals in the above-entitled consolidated cases, and, in support of this petition, represents to the Court as follows:

1. The opinion and decree of this Honorable Court entered in these two above-styled and numbered consolidated cases, under date of January 21, 1964, are erroneous and contrary to the law, and, without limiting the generality hereof, the said opinion and decree are erro-

neous and contrary to the law for the following specific reasons, to-wit:

I.

The Court Was in Error in Relying Upon the Case of *Irvine v. Marshall*, 61 U. S. (20 How.) 558, and in Failing to Apply and Follow the Doctrine of the Later Case of *Hodgson v. Federal Oil & Development Co., etc.*, 274 U. S. 15.

(a) This error resulted in both cases, when this Court, in relying upon *Irvine v. Marshall*, *supra*, completely ignored and apparently even failed to consider the later decision in *Hodgson v. Federal Oil & Development Co., etc.*, *supra*, where appellant sought to establish his alleged right to a one-eighth ($\frac{1}{8}$) interest in an oil and gas lease upon 160 acres of land in the State of Wyoming granted by the United States to appellee under the Mineral Leasing Act of February, 1920, the said claim being based, among other things, upon an alleged "relationship of trust and confidence" and where, in rejecting appellant's position, the United States Supreme Court said (in speaking of a well-recognized principle which forbids a cotenant from acquiring and asserting an adverse title against his companion because of the mutual trust and confidence sup-[fol. 1997] posed to exist) that "If the interests of the cotenant accrue at different times, under different instruments, and neither has superior means of information respecting the state of the title, then, either, unless he employs his co-tenancy to secure an advantage, may acquire and assert a superior outstanding title, especially where there is no joint possession." In disposing of appellant's claim under this well-established exception to the general rule, the Supreme Court cited several decisions including those of the courts of last resort of the states of Michigan, Illinois and Mississippi, and then commented:

"We know of no opinion by the courts of Wyoming to the contrary."

thereby clearly indicating that the rule invoked by appellant, as well as the exception that was applied by the Court, was to be measured by state law, and the decisions of other states were considered by the Court merely because there were no decisions from the State of Wyoming.

II.

This Court Was in Error in Relying Upon the Case of *Irvine v. Marshall*, 61 U. S. (20 How.) 558, and in Failing to Hold that its Authority as a Precedent Was Negated, if Not Overruled, by the Later Case of *Marquez v. Frisbie*, 101 U. S. 473, 25 L. Ed. 800.

(a) This error resulted in both cases, when this Court, in relying upon *Irvine v. Marshall*, *supra*, failed to consider [fol. 1998] the decision in *Marquez v. Frisbie*, *supra*, where the Court said:

"There are also objections besides this, fatal to the complaint and the relief asked under it.

"One of them is that the principal relief sought, that without which any other would be imperfect, is, that *defendants may be declared to hold the land in trust for plaintiff*, and compelled to convey the same accordingly. This, undoubtedly, means the legal title to the land, for the plaintiff alleges himself to have been in actual possession when he brought the suit and that he had been so for a great many years before. But the bill does not show that defendants, or either of them, ever had the legal title. On the contrary, it is a necessary conclusion from the allegations of the bill *that the legal title is in the United States*. After referring to the decision of the Secretary of the Interior against his claim, the petition says that 'In pursuance of this decision, an order was issued authorizing the defendants and other purchasers of the Vallejo title to enter the lands claimed by them; and the said defendants have entered and will be enabled to receive a patent for the said quarter-section.' It plainly ap-

pears from this: first, that defendants had not the legal title; second, that it was in the United States; and third, that the matter was still in fieri, *and under the control of the land officers.*

"Nothing in the record of the case before us gives evidence that any further steps in that department have been taken in the case.

[fol. 1999] "We have repeatedly held *that the courts will not interfere* with the officers of the Government, while in the discharge of their duties in disposing of the public lands, either by injunction or mandamus. *Litchfield v. Register*, 9 Wall. 575, 19 L. ed. 681; *Gaines v. Thompson*, 7 Wall. 347, 19 L. ed. 62; *Secretary v. McGarrahan*, 9 Wall. 298, 19 L. ed. 579.

"And we think it would be quite as objectionable to permit a state court, while such a question was under the consideration and within the control of the Executive Departments, to take jurisdiction of the case *by reason of their control of the parties* concerned, and render decrees in advance of the action of the Government, which would render its patent a nullity when issued.

"After the United States had parted with its title and the individual had become vested with it, the equities on which he holds it may be enforced, but not before. *Johnson v. Towsley*, 13 Wall. 72, 20 L. ed. 485; *Shepley v. Cowan*, 91 U. S. 330, 23 L. ed. 424.

"We did not deny the right of the courts to deal with the possession of the land, prior to the issue of the patent, or *to enforce contracts between the parties concerning the land.* But it is impossible thus to transfer a title which is yet in the United States." 101 U. S. 473, 474 and 475.*

(b) This error resulted in both cases, when this Court failed to recognize that the decision in *Marquez* holds that

* Unless otherwise noted, the emphasis of certain portions of the quotations herein has been supplied by petitioner.

[fol. 2000] the Court's actions in Irvine, and what it said therein about the power of a court of equity, was wrong, since the matter was still within the jurisdiction of the Land Department, and neither state nor federal courts could properly render decisions purporting to affect the title which was still vested in the United States.

(c) This error resulted in both cases in this Court's not holding that contracts between private individuals do not and cannot affect land, the title to which is in the United States, and that, accordingly, such contracts only operate *in personam* and are necessarily governed by local law.

III.

The Court Was in Error in Holding that "The United States Owed a Duty to Be Performed Both Through Its General Land Office and Through Its Federal Courts, to See that the Equitable as Well as the Legal Title to Public Lands Was Vested in the Proper Person, Who Proved His Right under the Federal Law," and thus "Whether the Lease from the United States to Wallis Was in Part for the Benefit of McKenna or of Pan American, or of Both, Are Questions to Be Determined by Federal Law."

(a) This error resulted in both cases, when this Court failed to follow the decision of the Supreme Court in *Ducie v. Ford*, 138 U. S. 587 (a case which cannot be distinguished from the cases at bar), *which affirmed the judgment of the lower Court in applying the local statute of frauds*, to an [fol. 2001] asserted *parol* claim of ownership and trust, with reference to a mining claim patented by the United States, where the asserted *parol* claim *originated prior to the issuance of the patent*, and this the Supreme Court did, without intimation or suggestion that the local statute of frauds was not the controlling law applicable.

(b) This error resulted in both cases, when this Court failed to accept and follow the decision by the Circuit Court of Appeal in *Blackner, et al. v. McDermott*, 176 F. (2d) 498 (CCA 10th, 1949), which case cannot be distin-

guished from the *McKenna* case, and which is in keeping with the decision by the Supreme Court in *Ducie v. Ford*, *supra*, and, which decision is contrary to the decision by the Court herein. (*Cf.* pp. 5, *et seq.*, of "Reply to Wallis to Original Brief of McKenna.")

(c) This error resulted in both cases, when this Court failed to accept and follow the decision of the Circuit Court of Appeal in *Oldland v. Gray*, 179 F. (2d) 408 (CCA 10th, 1950), certiorari denied, 339 U. S. 948, which decision is in keeping with the decision by the Supreme Court in *Ducie v. Ford*, *supra*.

(d) This error resulted in both cases, when this Court failed to hold, as respects the disposition of federal lands, or rights thereto, that no duty is imposed upon federal courts *which is over and beyond or greater than* the duty imposed by Congress upon the General Land Office, in view of the holding by the Supreme Court in *Alabama v. Texas*, 347 U. S. 272, that:

"The power of Congress to dispose of any kind of property belonging to the United States 'is vested in [fol. 2002] the Congress without limitation' . . . The power over the public land thus entrusted to Congress is without limitations, 'And it is not for the Courts to say how that trust shall be administered.' . . ."

(d) This error resulted in both cases, when this Court failed to hold that the duty imposed upon the courts and the General Land Office, as respects the disposition of land of the United States, or rights thereto, is set forth by the Supreme Court in *St. Louis Smelting & Ref. Co. v. Kemp*, 104 U. S. 636, 646, 647, to-wit:

"The general doctrine declared may be stated in a different form, thus: a patent, in a court of law, is conclusive as to all matters properly determinable by the Land Department, when its action is within the scope of its authority; that is, when it has jurisdiction under

the law to convey the land. In that court the patent is unassailable for mere errors of judgment. Indeed, the doctrine as to the regularity and validity of its acts, where it has jurisdiction, goes so far that if in any circumstances under existing law a patent would be held valid, it will be presumed that such circumstances existed...

"According to the doctrine thus expressed and the cases cited in its support, and *there are none in conflict with it*, there can be no doubt that the court below erred in admitting the record of the proceedings upon which the patent was issued, in order to impeach its validity. The judgment of the department upon their [fol. 2003] sufficiency was not, as already stated, open to contestation. If in issuing a patent its officers took mistaken views of the law, or drew erroneous conclusions from the evidence, or acted upon imperfect views of their duty, or even from corrupt motives, a *court of law* can afford no remedy to a party alleging that he is thereby aggrieved. *He must resort to a court of equity for relief*, and even there his complaint cannot be heard *unless he connects himself with the original source of title*, so as to be able to aver that his rights are injuriously affected by the existence of the patent; and he must possess such equities as will control the legal title in the patentee's hands. *Boggs v. Merced Mining Co.*, 14 Cal. 279, 363. It does not lie in the mouth of a *stranger to the title*, to complain of the act of the government with respect to it. If the government is dissatisfied it can, on its own account, authorize proceedings to vacate the patent or limit its operation."

and as set forth by the Supreme Court in *Steel v. St. Louis Smelting & Ref. Co.*, 106 U. S. 447 (1882), when it said:

"...So with a patent for land of the United States, which is the result of the judgment upon the rights of the patentee by that department of the government,

to which the alienation of the public lands is confided, *the remedy of the aggrieved party must be sought by him in a court of equity, if he possess such an equitable right to the premises as would give him the title if the [fol. 2004] patent were out of the way.* If he occupy with respect to the land *no such position as this*, he can only apply to the *officers of the government* to take measures in its name to vacate the patent or limit its operation. It cannot be vacated or limited in proceedings where it comes collaterally in question. It cannot be vacated or limited by the officers themselves; their power over the land is ended when the patent is issued and placed on the records of the department. This can be accomplished only by regular judicial proceedings, taken in the name of the government for that special purpose."

(e) This error resulted in both cases, when this Court held that there is some duty imposed upon the courts and the General Land Office as respects the disposition of lands of the United States, or rights thereto, which is over and beyond or greater than that delineated by the Supreme Court in *St. Louis Smelting & Ref. Co. v. Kemp*, *supra*, and *Steel v. St. Louis Smelting & Ref. Co.*, *supra*.

(f) This error resulted in both cases, when this Court did not follow the holding in the *St. Louis* case, *supra*, and thus failed to hold that:

(1) Only Wallis dealt with the Land Department, and, therefore, only Wallis derives a right from the original source of title, *i. e.*, the United States.

(2) Neither McKenna nor Pan American can "connect himself with the original source of title," *i. e.*, the United [fol. 2005] States; but that McKenna and Pan American only connect themselves to Wallis.

(3) Since neither McKenna nor Pan American dealt with the United States neither did or could derive any title or claim, equitable or legal, from the United States.

(4) Neither McKenna nor Pan American asserts or claims that the Land Department (a) did not properly divest the United States of its title to the lease, and (b) did not properly invest Wallis with title to said lease.

(5) Both McKenna and Pan American affirm the correctness of the action of the Land Department in having issued the lease to Wallis.

(6) Neither McKenna nor Pan American asserts that "his rights are injuriously affected by the existence of the patent (lease)," but, on the contrary, both affirm the proper issuance of the lease to Wallis, and claim under him.

(7) Since neither McKenna nor Pan American dealt with the United States, *vis-a-vis* the United States they are "strangers to the title" issued by the United States.

(8) Neither McKenna nor Pan American asserts that the Land Department, in issuing the legal title to the lease, should have named either or both of them as grantees of or cointerests with, Wallis.

[fol. 2006] (g) This error resulted in the *Pan American* case, when the Court failed to hold that (1) since Pan American had no contact with the United States, and (2) since the contract with Pan American was only an option contract, which only gave it a right to acquire a lease from Wallis, *but only after the legal title to the lease had issued to Wallis from the United States*, it could not be said that the issuance of such legal title by the United States was for the benefit of Pan American, and thus governed by federal law.

(h) This error resulted in both cases, when this Court failed to hold that contracts relating generally to the acquisition of lands of the United States, or rights thereto, are governed by local law, when such contracts contemplate that the legal title would issue from the United States to Wallis, and to Wallis alone.

(i) This error resulted in both cases, when this Court failed to hold that in disposing of federal lands there can be no duty upon either the Land Department or the Courts, which is not fully and finally discharged, when the title is actually issued and there is no showing that, in transferring the legal title, the Land Department (1) acted improperly, (2) was imposed upon, or (3) failed to give effect to a *prior right or claim originating with the Land Department*.

(j) This error resulted in both cases, when this Court failed to hold that the United States, in disposing of its lands or rights thereto, has no interest in disputes between private individuals, when no question is raised as to the correctness of the action of the Land Department, [fol. 2007] but, on the contrary, the said private parties affirm the correctness of such action, and assert claims based thereon.

(k) This error resulted in the *McKenna* case, when this Court failed to hold that the United States was not concerned with any controversy between Wallis and McKenna, in light of McKenna's allegation in Article V of his complaint (Tr. p. 4) that "it was determined that a Public Lands Application should be filed *in Wallis's name* with the Bureau of Land Management," thus disclosing that McKenna approved, in all respects, the action of the B. L. M. in issuing the lease to Wallis, and, the United States not being concerned, such controversy is governed by local law.

IV.

The Court Was in Error in Its Interpretation and Application of the Decision in *Irvine v. Marshall, et al.*, 1858, 61 U. S. (20 How.) 558.

(a) This error resulted in both cases, when this Court did not hold that the local statute involved in *Irvine* was not a statute of frauds (1) since the case was up on a demurrer, which admitted the agreement alleged upon (2)

it in nowise related to the manner or mode of proving the contract, and (3) under the statute the agreement involved could have been proven by *parol* evidence.

(b) This error resulted as to both cases, when this Court did not hold that the local statute involved in *Irvine* was not a statute of frauds, for upon remand of the case and on [fol. 2008] trial the existence of the agreement, as a written agreement, was shown. *Cf. Irvine v. Marshall and Barton*, 7 Minn. 286 (1862).

(c) This error resulted as to both cases, when this Court did not hold that the local statute involved in *Irvine* was an attempt to vest title, and thus affect substantive rights, when the legal title to the property was in the United States, and, in disregarding this language by the Supreme Court of the United States, to-wit:

“ . . . That in every instance of a grant or purchase, or of an agreement for the purchase of lands for a valuable consideration, in which the price or consideration shall be paid by one person, and the conveyance or the contract for title shall be to another, no use or trust shall result in favor of the person by whom such payment shall be made, *but the title and possession shall vest exclusively in the person named as the alienee in such conveyance or agreement.* The position asserted by the court of Minnesota, *in interpreting their Statute, must be understood as broadly as it has just been stated, or it has no application to the case before us . . .*” 61 U. S. (20 How.) 558, 561.

(d) This error resulted as to both cases, when this Court did not hold that *Irvine* is inapplicable to these cases but applies to that class of cases recognized by the Supreme Court in *Marquez v. Frisbie*, 101 U. S. 473, 25 L. Ed. 800, when the Court said:

[fol. 2009] “We did not deny the right of the Courts to deal with the possession of the land, prior to the

issue of the patent, or to enforce contracts between the parties concerning the land. But it is impossible thus to transfer a title which is yet in the United States." 101 U. S. 473, 475.

(e) This error resulted as to both cases, when this Court did not hold that, inasmuch as title had not issued from the United States in *Irvine*, what the Court said therein about the title of *Irvine*, and resulting trusts, was mere *obiter*, if not improper and uncalled for, since the Land Department had not acted, and hence the Court should have contented itself with saying that the local statute, being substantive law, was not binding on the officials of the Land Office.

(f) This error resulted as to both cases, when this Court failed to hold that what the Court said in *Irvine*, on the basis of *Massie v. Watts*, 6 Cranch. 143, was not actually supported by *Massie v. Watts*, for that case did not (1) involve federal law, but state law, since the lands had been patented by the State of Virginia, (2) the sole question in *Massie* was the equity power of a federal court, *sitting in one state*, to decree *in personam* a transfer of property situated in another state, (3) the legal title to the land had already issued, and (4) there was involved a question of conflicting, but independent, grants from the sovereign.

[fol. 2010]

V.

This Court Was in Error in Citing and Relying on the Cases and Authorities Noted at Page 7 of the Majority Opinion, Inasmuch as Such Authorities Are Clearly Distinguishable and Have No Controlling Authority in these Cases.

VI.

The Court Erred in Holding that the Contracts between Wallis and Plaintiffs, Respectively, Were Governed by Principles of Federal Law, Rather than Local Law, and in Not Affirming the Decision of Trial Court.

(a) This error resulted in both cases, when this Court held that federal law would apply to contracts between private individuals, rather than local law, where such contracts related generally to the acquisition of lands of the United States, or rights thereto, in disregard of the decision by the Supreme Court, with reference to such contracts executed by the early settlers of what is now the State of Oregon, where it held local law to be applicable, in *Stark v. Starr*, 94 U. S. 477, 487 (1876), saying:

" . . . They did not deny, in any of their dealings, the proprietorship of the United States; but they acted upon a confident expectation that their possessions and improvements would be respected by the government, and that ultimately they should acquire the title. This expectation was founded upon the uniform action [fol. 2011] of the government in its dealings with the public domain, occupied by settlers in advance of legislation for its sale. It was, therefore, understood by the people that, whenever the legal title was thus obtained, it should inure to the benefit of the grantees of the claimant who secured the patent of the United States. This understanding constituted, in reality, the unwritten conventional law of the State, which affected all transactions in land until the passage of the Donation Act . . ."

VII.

If It Be Assumed that the Contracts Here Involved Are Governed by Federal Law, this Court Was in Error in Refusing to Affirm the Judgment of the Trial Court in Applying the Local Statute of Frauds, Which Is a Statute Affecting Remedy.

(a) This error resulted in both cases, when this Court refused to accept and follow the decisions of *Hamilton Foundry & M. Co. v. International M. & F. Wkrs.*, 193 F. (2d) 209 (CCA 6th, 1951), and *Hamilton v. Glassell*, 57 Fed. (2d) 1032 (CCA 5th), which were cited and discussed

at pp. 6, *et seq.*, of "Reply of Wallis to Original Brief of McKenna."

VIII.

Assuming Federal Law Is Applicable, this Court Was in [fol. 2012] Error in Remanding the Cases for a Trial on the Issue of What Constituted the Contracts Between the Parties, as Contracts, Since the Trial Court Heard All Evidence, *Parol* and Written, and Decided this Issue; Until this Court Has Determined that Such Decision Is in Error on this Issue, in the Light of the Proper Applicable Federal Law, It Has Not Determined that There Is Reversible Error as to this Issue.

(a) This error resulted in both cases, when this Court failed to distinguish between "harmless" error and "reversible" error, and failed to hold (as to the issue of what constituted the contracts between the parties, as contracts, and with respect to which the trial Court received and heard all extrinsic evidence, oral and written) that the trial Court's decision thereon was not "reversible" error merely because of the *source* of the law applied in determining such issue, and such decision would constitute "reversible error" as to this issue *only* when this Court has decided and determined that the decision was in error in the light of the proper federal law. The conclusions of the trial judge on this important basic issue are covered in the following extract from his opinion:

" . . . Having failed to obtain new written agreements, each of the plaintiffs is compelled to rely on a single instrument. McKenna's claim is imprisoned in the letter agreement of December 27, 1954-January 3, 1955; Pan American's claim is confined to the language [fol. 2013] of the March 3, 1955 option. Except as it throws light on their original intent, the conduct of the parties after those dates is irrelevant."

• • • • •

"The letter which incorporates the agreement between Wallis and McKenna, after particularly listing and identifying certain numbered lease applications, being those filed by Wallis under the Mineral Leasing Act for Acquired Lands, confirms in McKenna 'a $\frac{1}{3}$ undivided interest IN THE ABOVE CAPTIONED OIL AND GAS LEASE APPLICATIONS . . . (and) such lease or leases as may be issued . . . UNDER THESE CAPTIONED APPLICATIONS . . . ' (emphasis added). Similarly, the agreement with Pan-American recites the same five pending applications and grants the company 'the right and option . . . to acquire any and all oil and gas leases which may be issued . . . UNDER AND BY VIRTUE OF THE ABOVE REFERRED TO APPLICATIONS.' (Emphasis added). Much is made of a second paragraph of the option agreement where Wallis promises, in general terms, to 'make diligent efforts' to obtain a lease over the lands covered by the applications. But that provision does not purport to enlarge the scope of the grant. Thus, both instruments speak exclusively of an acquired lands lease. Was this an oversight?

"With scant excuse, the court permitted parol evidence to show the true intent of the contracting parties on the date of the agreements were executed. But, not surprisingly, the documents and testimony pro-[fol. 2014] duced only confirmed the indication of the written instruments that on January 3 and March 3, 1955, no one contemplated issuance of a lease to Wallis except in pursuance of the then pending acquired lands applications. That was all they talked about. And, quite naturally, that is all they put into their agreements. Doubtless, McKenna and Pan-American were both anxious to share in ANY LEASE Wallis might obtain over these lands. At the time, however, they saw only one means of achieving that end. Had they anticipated the ultimate issuance of a public do-

main lease, perhaps they would have purchased an interest in that contingency too. But that is a futile speculation. Obviously they cannot be said to have intended to buy a share in a future they did not even advert to. The conclusion must be that the written agreements faithfully record what was in the minds of the parties. Accordingly, there is no pretext for a strained construction or for reformation of the instruments. These instruments, taken alone or illumined by parol evidence, limit the claims of McKenna and Pan-American to the acquired lands applications." 200 F. Supp. 468, 471, *et seq.*

2. For the reasons aforesaid, those heretofore argued and submitted in briefs heretofore filed, and the elaboration of the above, as set forth in a supporting brief to be filed in connection with this petition, a rehearing of the appeals in the above numbered and entitled consolidated cases should be granted.

[fol. 2015] Wherefore, the premises considered, Floyd A. Wallis, appellee in each one of the above numbered and styled consolidated cases, prays that a rehearing be granted in each said case, and, upon such rehearing, the opinion and decree under date of January 21, 1964, be set aside and judgment be entered affirming the judgment of the trial Court in both cases.

Respectfully submitted,

C. Ellis Henican, Suite 2601—225 Baronne Street,
New Orleans, La. 70112; H. M. Holder, 1300 Beck
Building, Shreveport, Louisiana, Attorneys for
Floyd A. Wallis.

CERTIFICATE

I, one of the counsel for Floyd A. Wallis, appellee, in each one of the above numbered and styled consolidated causes, do hereby certify that the above and foregoing petition for rehearing is presented in good faith and not for delay, and that copies of the said petition have been forwarded to all other counsel of record herein by U. S. mail in envelopes properly addressed, with postage prepaid, on this 7 day of February, 1964.

C. Ellis Henican.

[fol. 2209]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19631

PATRICK A. McKENNA, Appellant,

versus

FLOYD A. WALLIS and PAN AMERICAN PETROLEUM
CORPORATION, Appellees.

PAN AMERICAN PETROLEUM CORPORATION, Appellant,

versus

FLOYD A. WALLIS, Appellee.

Appeals from the United States District Court for the Eastern District of Louisiana.

OPINION ON PETITIONS FOR REHEARING—April 20, 1965

Before Rives and Wisdom, Circuit Judges, and Bottle, District Judge.

[fol. 2210] Rives, Circuit Judge: All parties have petitioned for rehearing and the Court has received additional briefs. In our original opinion, this Court held, Judge Wisdom dissenting, that federal law should be applied to determine rights asserted separately by Patrick A. McKenna and Pan American Petroleum Corporation in an oil and gas lease from the United States to Floyd A. Wallis covering public domain land. The district court had decided that under Louisiana law neither McKenna nor Pan American acquired any interest in the lease. We vacated the judgment and remanded the cause "for re-trial upon the evidence already taken and any additional relevant evidence, and for full and complete findings of fact and conclusions of law on all issues under the applicable principles of federal law." Pan American has petitioned for a rehearing limited to the interpretation of its claimed option agreement with Wallis, and it requests this Court to find as a fact that Wallis breached his fiduciary relationship. McKenna limits his petition for a rehearing to a request for additional findings of a joint venture between Wallis and McKenna, that Wallis breached his fiduciary obligations to McKenna and that Wallis failed to prove fraud on the part of McKenna. Wallis challenges our holding that federal law governs the claims of McKenna and Pan American and our reliance upon *Irvine v. Marshall*, 61 U.S. (20 How.) 558 (1858).

As stated in our original opinion, the United States, acting through the Secretary of the Interior, issued an oil and gas lease of public domain land to Floyd A. Wallis pursuant to the Mineral Leasing Act of 1920, 30 U.S.C.A. §181, et [fol. 2211] seq. We have concluded that our decision should be more closely tied to that Act.

It should be noted that the actions before the district court, and before this Court on appeal, do not seek to overturn the decision of the Secretary awarding the lease to Wallis. McKenna and Pan American were not applicants who competed with Wallis before the Secretary. Indeed, it is evident that McKenna and Pan American supported

Wallis's claim to the Secretary that he was the first qualified applicant for the acreage in question and entitled to a lease. If these actions were those of "competing claimants," the Secretary's decision would be subject to judicial review only if it were shown that he had acted arbitrarily or unreasonably or that his interpretation of what constitutes "public lands" was erroneous as a matter of law. *E.g.*, *Morgan v. Udall*, D.C. Cir. 1962, 306 F.2d 799.

We again deal with which law applies, and particularly with the contention that the Rules of Decision Act, 28 U.S.C. §1652 (1958), requires that state law be applied to determine the claims of McKenna and Pan American to the oil and gas lease. It appears that the district court felt that the Rules of Decision Act compelled adherence to the local law. See 200 F.Supp. at 471-72, n. 13. And the Tenth Circuit has followed that view in a case involving a claim of "joint venture" highly similar to McKenna's claim here. *Blackner v. McDermott*, 10 Cir. 1949, 176 F.2d 498. That court held, *inter alia*, that

"... jurisdiction of the court resting upon diversity of Citizenship, and the action not being one under federal [fol. 2212] law, the relationship of the parties each toward the other in respect of the leasehold estate must be determined by the law of Wyoming. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 . . . *Ruhlin v. New York Life Insurance Co.*, 304 U.S. 202"

176 F.2d at 500. Although the actions in the instant case were predicated upon diversity of citizenship, and although the action is not one under federal law in the sense that federal law did not create the right of action, it does not necessarily follow that the district court was required to apply state law. The Rules of Decision Act¹ says nothing

¹ The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. 28 U.S.C.A. §1652.

about the basis of jurisdiction. While it is true in the bulk of diversity cases the substantive issues are nonfederal and hence state substantive law is determinative, this is not always true.² The law applied should be keyed to the nature of the issue before the court; if nonfederal, state substantive law should be applied; if a federal matter is before the court, federal law should be applied.³ *Francis v. Southern Pacific Co.*, 1948, 333 U.S. 445, involved an action for the wrongful death of a railroad employee who was killed while riding on a free pass. Jurisdiction was predicated upon diversity of citizenship and the right of action was created by state law. Federal statutes provided extensive regulation of the giving of free passes by railroad; [fol. 2213] however, these statutes were silent as to the tort duties of a railroad to the recipient of a free pass. The Supreme Court held that federal law was to be applied and that state's tort law did not control. The "*Erie* doctrine" does not annul the federal courts' responsibility to develop federal common law in aid of the uniform implementation and protection of federal interests.⁴

In summary, when jurisdiction of the federal courts is based on diversity of citizenship, all nonfederal matters will be decided by applying the law of the state in which the court is sitting while federal issues in such cases will be decided by reference to federal law. Where federal matters are involved, the specific language of valid federal statutes will control when applicable; where federal statutes do not clearly articulate the law to be applied, federal courts must fill the interstices; federal courts can do this by reference to federal or state law and the choice here depends on a number of different factors.⁵ The first ques-

² See 1A Moore, Federal Practice ¶ 0.305[3], at 3045 (2d ed. 1961).

³ See 1A Moore, *op cit.*, *supra*, ¶ 0.305[3], at 3053.

⁴ 50 Va. L. Rev. 1236 (1964).

⁵ 1A Moore, *op cit.*, *supra* ¶ 0.328, at 3901.

tion presented in the instant case is whether or not "federal matters" are involved.⁶

Prior to 1920, lands of the United States containing deposits of coal, phosphate, sodium, oil, oil shale, and gas were open to location and acquisition of title. Congress, by its mining laws, provided that claims might be "located" on these lands on the performance of certain conditions. Congress also made provision for issuing patents for claims located under the mining laws. See *Wilbur v. United States, ex rel. Krushnic*, 1930, 280 U.S. 306, 314. When the location of a mining claim was perfected under the law, it had the effect of a grant by the United States of the right of present and exclusive possession. The claim was property in the fullest sense of that term and might be sold, transferred, mortgaged, and inherited without infringing any right or title of the United States. The right of the owner was taxable by the state and was "real property" subject to the lien of a judgment recovered against the owner in a state or territorial court. See *id.* at 316. However, the Mineral Leasing Act of 1920 effected a complete change of policy in respect of the disposition of lands containing deposits of coal, phosphate, sodium, potassium, oil, oil shale, or gas. Such lands were no longer to be open to location and acquisition of title, but only to lease. *Id.* at 314 (dictum). A mineral lease does not give the lessee anything approaching the full ownership of a fee patentee, nor does it convey an unencumbered estate in the minerals. *Boesche v. Udall*, 1962, 373 U.S. 472, 478 (dictum) (Secretary has authority to cancel lease granted in violation of Act and regulations promulgated thereunder). In the latter case, the Supreme Court stated that,

"Unlike a land patent, which divests the Government of title, Congress under the Mineral Leasing

⁶ As one student commentator has put it: "First, the federal court must determine whether a sufficient federal interest is present to preempt the authority of state law." 50 *Va. L. Rev.* 1236, 2141 (1964).

Act has not only reserved to the United States the fee interest in the leased land, but has also subjected the lease to exacting restrictions and continuing supervision by the Secretary."

[fol. 2215] *Id.* at 477-78. Thus the Secretary is given power to prescribe rules and regulations governing in minute detail all facets of the working of the land leased. 30 U.S.C.A. §189. The Secretary may direct complete suspension of operations on such land, 30 U.S.C.A. §209, or require the lessee to operate under a cooperative or unit plan, 30 U.S.C.A. §226 (j). See *Boesche v. Udall*, 1962, 373 U.S. 472, 478. And as we noted in our original opinion, the public policy of the United States directed at opposing the monopoly of federally-owned mineral deposits requires that the Secretary examine into the qualifications of the real lessee and any assignee of a mineral lease or of a part interest. See 30 U.S.C.A. §§ 181, 184. This includes oil and gas leases "acquired directly from the Secretary under this Act or otherwise . . . (including options for such leases or interests therein)." 30 U.S.C.A. § 184(d)(1). Such "options" are limited as to acreage, 30 U.S.C.A. § 184(d)(1), and time, 30 U.S.C.A. § 184(d)(2). "No option . . . shall be enforceable if entered into for a period of more than three years . . . without the prior approval of the Secretary." 30 U.S.C.A. § 184(d)(2). By implication, "options" for less than three years may be freely entered into without prior approval. However, "No option . . . shall be enforceable until notice thereof has been filed with the Secretary" 30 U.S.C.A. § 184 (d)(2). Furthermore, assignments or subleases of all or part of the acreage included in an oil or gas lease must be approved by the Secretary. See *Boesche v. Udall*, 1962, 373 U.S. 472, 478; 30 U.S.C.A. § 187a. The Secretary is required to disapprove the "assignment" or "sublease" only for lack of qualification under the Act or for lack of sufficient bond. See 30 [fol. 2216] U.S.C.A. § 187a. Nowhere in the Mineral Leas-

ing Act of 1920 are the terms "assignment" and "option" defined.

The posture of the instant case is interstitial. The Secretary has granted a lease to Wallis. We deal with claims that are, in essence, an alleged "option" and an alleged "assignment," but which, ultimately, must be approved by or registered with the Secretary. We think, therefore, that there is a sufficient federal interest for the substantive independence of the federal court in determining the claims of McKenna and Pan American.

It might be said that the absence of a congressional definition of "option" and "assignment"—whether they may be oral or arise by operation of trust—implies that we should look to the law of the state. But we are impressed by the fact that the Mineral Leasing Act of 1920 represents a comprehensive scheme of federal regulation. Besides the public policy directed at opposing the monopoly of federally-owned mineral deposits, Congress has expressed recent concern over "a potentially dangerous slackening in exploration for development of domestic reserves of oil and gas so necessary for our security in war and peace." It removed "certain legislative obstacles to exploration for development of the mineral resources of the public lands and [to] spur greater activity for increasing our domestic reserves." S.Rep. No. 1549, 86th Cong., 2d Sess. (1960), reprinted in 1960 U.S. Code Cong. & Ad. News 3313, 3314-15. As Judge Wisdom noted in his dissent, the civil law does not recognize resulting trusts or constructive trusts and therefore the law of Louisiana differs importantly from the laws of the common-law states. While [fol. 2217] it might be said that the claim of McKenna for the assignment of part interest in the acreage covered by the lease and the claim of Pan American of the option agreement constitute transactions essentially of local concern and that the resulting litigation is "purely between private parties," we think that the interest of the United States is directly affected. Compare *Bank of America Nat'l Trust & Sav. Ass'n v. Parnell*, 1956, 352 U.S. 29, 33-

34. It is clear that the Mineral Leasing Act recognizes the devices of "assignments" and "options" as concomitants to the public policy against monopoly of federally-owned mineral deposits and, on the other hand, the public policy towards development of our mineral resources and increasing our domestic reserves. We do not think the use of these devices as a part of the scheme of carrying forth this public policy should be limited by interstitial restrictions imposed by the law of the State of Louisiana, which are not present in the other states. In a word, we think this is an area for uniformity.⁷

We hold to what we said in our original opinion in that "we would intimate no opinion as to who may ultimately be entitled to prevail in this litigation . . . [T]he judgment should be vacated and the cause remanded for re-trial upon the evidence already taken and any additional relevant evidence, and for full and complete findings of fact and conclusions of law on all issues under the applicable principles of federal law."

Rehearing Denied.

[fol. 2218] WISDOM, Circuit Judge, dissenting:

I respectfully dissent.

I do not say that the Court's decision is likely to start dangerous temblors in American federalism. It has always been in the cards that federal common law would expand as the activities of the national government expanded.¹ For many years, before *Erie*, the federal "judge followed his own nose"; he "sat down and looked up what relevant federal law there might be in the cases and otherwise decided what the law ought to be . . . though in some

⁷ *Hodgson v. Federal Oil & Development Co.*, 1927, 274 U.S. 15, does not lead to a different result. We read *Hodgson* as fashioning a federal law of fiduciary relationship by drawing on the law of several states. See *id.* at 19-20.

¹ See Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. Pa. L. Rev. 797 (1957).

few instances the judge might consider relevant state decisions".² Moreover, I agree with Judge Henry Friendly's summary of the development, since *Erie*, of the "new" federal common law: "We may not have achieved the best of all possible worlds with respect to the relationship between state and federal law. But the combination of *Erie* with *Clearfield* and *Lincoln Mills* has brought us to a far, far better one than we have ever known before."³ I do say that in this case the Court's resort to federal common law is so inappropriate as to amount to a deep and uncalled-for cut against the grain of American federalism.

I.

We sit as an *Erie* court, bound by the law of Louisiana; bound too by the Rules of Decision Act. Yet in this squabble between private persons the Court holds that the nature of the ownership of the lease, that is, the nature [fol. 2219] of the lessee's interest in the minerals as against third party claimants, is a matter to be determined by judge-made federal common law. The Court brushes aside the state's longstanding public policies against title by parol⁴ and against resulting and constructive trusts, de-

² Morgan, *The Future of a Federal Common Law*, 17 Ala. L. Rev. 10, 12 (1964).

³ Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 422 (1964).

⁴ In the opinion below Judge Wright correctly noted: "While the legislative declaration that rights in mineral leases are 'real rights and incorporeal immovable[s],' LSA-R.S. 9:1105, has not always been given full effect. [citing cases] . . . [T]he Louisiana Supreme Court has been consistent in reading § 1105 as requiring that contracts affecting such rights comply with the statute of frauds. *Arkansas Louisiana Gas Co. v. R. O. Roy & Co.*, 196 La. 121, 198 So. 768; *Davidson v. Midstates Oil Corporation*, 211 La. 882, 31 So. 2d 7; *Wier v. Glassell*, 216 La. 828, 44 So. 2d 882; *Acadian Production Corp. of Louisiana v. Tennant*, 222 La. 653, 63 So. 2d 343. . . . The rule applies to McKenna's agreement, whether it is considered as creating a joint venture or an agency relationship. See *Stack v. De Soto Properties*, 221 La. 384, 59 So.

vices alien to the civil law.⁵ The "jurisprudence of this [fol. 2220] State . . . has been consistent to the effect that the transfer of an interest in a mineral lease cannot be

2d 428, 430-431; LSA-C.C. Art. 2992. So does it apply to Pan American's option contract. LSA-C.C. Art. 2462." McKenna v. Wallis, E.D.La. 1961, 200 F. Supp. 468, n. 13 at 471. In Hayes v. Muller, La. App. 1962, 146 So. 2d 176, 179, the court held that an alleged joint venture effecting the transfer of an interest in a mineral lease cannot be made the subject of a verbal agreement and cannot be proved by parol evidence. The Louisiana Supreme Court affirmed, 245 La. 356, 158 So. 2d 191, 198, commenting, on rehearing, that it had been "zealous . . . to guard against any deviation from the rule" that the "plaintiff cannot show an oral agreement to purchase property for him, and enforce the contract when it has been fraudulently violated (by acquisition in defendant's name), despite the argument made therein that the evidence did not constitute an attack on the title of the defendant but was merely an attempt to profit from and through such title."

⁵ "Article 21 of the Louisiana Civil Code of 1870 authorizes the courts to apply equitable principles in their decisions. Porter v. Conway, 181 La. 487, 159 So. 725 (1934); see Willey v. St. Charles Hotel, 52 La. Ann. 1581, 1584, 28 So. 182, 186 (1899); see Franklin, Equity in Louisiana, 9 Tulane L. Rev. 485 (1935). However, it is frequently stated that from a theoretical viewpoint there can be no constructive trust in a civil law jurisdiction. See Patton, Future of Trust Legislation in Latin America, 20 Tulane L. Rev. 542, 548 (1946); see Wisdom, The Louisiana Trust Estates Act, 13 Tulane L. Rev. 70, 83 (1938)." Note, 26 Tul. L. Rev. 262 (1952). See also Note, 25 La. L. Rev. 276, 280 (1964).

Since all transfers of immovable property must be in writing and, under LSA-C.C. Arts. 2275, 2276, 2440, parol evidence is not admissible to vary the terms of a written conveyance or to prove an oral agreement of sale, a defrauded principal or joint venturer cannot through parol evidence prove title to immovables purchased by an agent or joint venturer under an oral mandate. Serto v. LeBlanc, 191 La. 137, 184 So. 567 (1938); Ceromi v. Harris, 187 La. 701, 175 So. 462 (1930); see Note, 21 Tulane L. Rev. 286 (1946). However, parol evidence may be used to prove fraud or error in an action to rescind written sales of real estate. Baker v. Baker, 219 La. 1041, 26 So. 2d 132 (1946); LeBleu v. Savoie, 109 La. 680, 33 So. 729 (1903); cf. Reid v. Phillips, 177 La. 497, 148 So. 690 (1933).

There are, however, a number of loose references in Louisiana decisions to "constructive trusts". McClendon v. Bradford, 42 La.

[fol. 2221] made the subject of a verbal agreement and cannot be proved by parol evidence". *Hayes v. Muller*, La. App. 1962, 146 So. 2d 176, 179. On remand, the law the district judge must conjure up is as uncertain and insubstantial as the "brooding omnipresence in the sky", of which Justice Holmes spoke, because this evanescent law

Ann. 160, 7 So. 78 (1890); *Gervais v. Gervais*, 9 Orl. App. 69 (1911); *Gaines v. Chew*, 2 How. 619, 650 (U. S. 1844); *Berthelot v. Isaacson*, 5 Cir. 1922, 278 Fed. 921, 923. A result similar to the common law constructive trust has been attained in Louisiana decisions holding that title to *movable* property which is acquired by an agent through a breach of his fiduciary duty inures to the benefit of the principal. *Sentell v. Richardson*, 211 La. 288, 29 So. 2d 852 (1947); noted in 22 *Tulane L. Rev.* 196, and 8 *La. L. Rev.* 223 (1948) (purchase of hospital stock). Or when an agent acquires his principal's property by fraud or error. *Assunto v. Coleman*, 158 La. 537, 104 So. 318 (1925) (agent purchased principal's property at judicial sale).

Mansfield Hardwood Lumber Co. v. Johnson, 5 Cir. 1959, 268 F.2d 317, 319, 324, is a good example of federal court handling of Louisiana decisions in this area of the law. There this Court agreed "that the Louisiana Civil Law prohibits the imposition of a constructive trust or equitable lien on property". The Court recognized however that under LSA-C.C. Art. 1847 "a breach of the fiduciary relationship is called fraud [not constructive fraud] and the remedy is, of course, a rescission of the contract or damages. By bringing such relationship under the broad heading of fraud, the Louisiana courts have, in effect, reached the same results as would be reached under the common-law-results which seem to common-law lawyers hard to obtain under a literal interpretation of the Civil Code." Accordingly, in *Mansfield* the district court rescinded the sale of the plaintiff's stock to the defendant, recognized the plaintiffs as the owners of the stock, and ordered the defendant to render an accounting to the plaintiffs.

All of this adds up to the fact that by different theories the civil law reaches many of the results the common law reaches. There is no exact civilian equivalent to the Anglo-American resulting trust or constructive trust. Here, the claimants may suffer from the difference between the two legal systems. But the difference in remedies generally is not so great as to justify the majority's far-out idea that Louisiana's lack of resulting and constructive trusts, as the Lord Chancellor knows them, substantially interferes with the national policy on mineral reserves.

is *not* the articulate voice of a sovereign that can be identified.⁶

The holding of the Court carries alarming implications. If federal common law controls and the claimants hold an equitable title by virtue of a constructive trust, what is Mrs. Wallis's interest? Assuming that Wallis has a part interest as lessee, does his wife have half of his interest as her share in the community? Or is she a common law partner with him? Or does she have no interest in the lease? Are Wallis's children deprived of their legitim, their forced portion of their father's estate, as to their father's interest in the lease? I hope my fears are all bloodless ghosts. But if a federal court, in the name of interstitial law-making, may concoct a Law of Property, Law of Contracts, Law of Restitution and, perhaps, a Law of Descent and Distribution for Mississippi Mud-Lumps, I foresee the fashioning of some fancy legal systems for a great many federal enclaves within the borders of the states.⁷

[fol. 2222]

II.

"There is", of course, "no federal general common law".⁸ However, the term "federal common law", like Justice Rutledge's substitute term, "law of independent judicial

⁶ "The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi-sovereign that can be identified." *Southern Pacific Co. v. Jensen*, , 244 U. S. 205, 222, 37 S.Ct. 524, 61 L.Ed. 1086. Cf. Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 Yale L. J. 205, 274 (1946).

⁷ "Establishing a body of substantive law for federal courts in matters not otherwise of federal concern is not a legitimate end within the scope of the Constitution; thus to frustrate the ability of the states to make their laws fully effective in areas generally reserved to them would be inconsistent with the constitutional plan." Friendly, *supra*, n. 3 at 397.

⁸ *Erie R. Co. v. Tompkins*, 1938, 304 U. S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188.

decision",⁹ is an acceptable euphemism for federal judicial legislation. No one can quarrel with such law-making when congressional intent and national interest speak in the loud, clear voice of the sovereign. But the fact that there are interstices in a federal statute is not enough in itself to justify a court's applying federal common law. There are interstices in every statute.

Before a court plugs a statutory gap with federal law that is inconsistent with local law and that here is also contrary to established state policies, consideration for the position of the states in the federal system suggests that the Court find congressional intent that federal common law should prevail over state law.¹⁰ "The political logic of federalism supports placing the burden of persuasion on those urging national action."¹¹ When congressional intent is unclear or when a specific congressional intent never existed, a reasonable criterion is that judge-made [fol. 2223] common law should not prevail over local law unless that result is manifestly in the national interest. Uniformity for uniformity's sake does not meet this criterion; under *Erie* and the Rules of Decision Act, diverse local law controls the hum-drum disputes of private litigation that do not raise a federal question and do not conflict with the interests of United States. In this case, I find no congressional intent and no compelling national interest sufficient to justify an independent federal rule displacing long accepted state law.

⁹ *United States v. Standard Oil Co.*, 1947, 332 U. S. 301, 308, 67 S. Ct. 1064, 91 L. Ed. 2067.

¹⁰ "The issue that must be determined in each instance is what heed Congress intended to have paid to state law in an area where no heed need constitutionally be paid—more realistically, in Gray's famous phrase, 'to guess what it would have intended on a point not present to its mind, if the point had been present.' We cannot expect that we shall always agree with the answer to such a question; we do have a right to expect that the question shall always be put." Friendly, n. 3, at 410.

¹¹ Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 *Colum. L. Rev.* 543, 545 (1954).

This is a dog-eat-dog, no-holds-barred fight between private persons, each crying foul, over the nature of the ownership of a lease. Resolution of the controversy depends upon legally acceptable proof of the relationship of Wallis to McKenna and Pan American. It is true that the acts generating the litigation took place before execution of the lease. The point in time when these acts occurred, however, is not important to the United States as lessor, as it was in *Irvine v. Marshall*, 1858, 20 How. 558, 15 L. Ed. 994, since the dispute arose *after title to the mineral leasehold had passed from the United States to Wallis*.¹² Be-

¹² In the instant case the entire title, legal and equitable, to the mineral leasehold passed at the time the lease was executed. In *Irvine v. Marshall*, on which the Court relied so strongly in the original opinion, the patent had not been issued to either of the competing parties. The Supreme Court recognized, however, that an entirely different rule would apply *once legal title had in fact passed from the United States*:

"We hold the true principle to be this: that whenever the question in any court, State or Federal, is whether a title to land which was once the property of the United States has passed, that question must be resolved by the laws of the United States; but that whenever, according to those laws, the title shall have passed, then the property, like all other property in the State, is subject to state legislation, so far as that legislation is consistent with the admission, that the title passed and vested according to the laws of the United States."

Pan American Petroleum Corporation v. Pierson, 10 Cir. 1960, 284 F.2d 649, cert. denied, 366 U. S. 936 supports Wallis's position. The Court held that the Secretary has no "authority to cancel an oil and gas lease for fraud of a lessee precedent to lease issuance". The Court said: "[T]he government, by the issuance of the lease, has performed the last act required of it to vest in the lessee the right to explore for, produce, market and sell the oil and gas underlying the leased premises." 284 F.2d at 654. The effect of this decision is uncertain, however, in view of *Boesche v. Udall*, 1963, U.S. , 83 S. Ct. , L.Ed.2d , holding that the Secretary has the administrative power, beyond § 31 of the Act, to cancel a lease because of an administrative error; § 31, allowing cancellation for the lessee's non-compliance with any of the provisions of the lease, applies only to situations in which a valid lease has been issued. The Court in *Boesche* was aware of *Pan American*, but did not discuss the case and spoke only in terms of administrative error. See Miller, *The Historical Development of the Oil and Gas Laws of the United States*, 51 Col. L. Rev. 506, 530 (1963).

sides, McKenna and Pan-American do not question the validity or effectiveness of the transfer of the mineral leasehold from the United States to Wallis. On the contrary, it is essential to their position that they accept the validity of Wallis's lease: McKenna claims a one-third interest in the lease as a joint venturer; Pan-American demands an assignment of the lease under an option contract.

Whether Wallis holds the lease for himself or for others and whatever the interests of McKenna and Pan-American may be as against Wallis, the United States is protected by the terms of the lease and by statutory requirements that the Secretary of Interior investigate and approve Wallis and any assignee or sublessee. The United States owns the fee and exercises tight control over the lease through the Secretary's power to prescribe rules and regulations governing in minute detail all facets of the working of the land leased.

[fol. 2225] The United States has of course a proper interest in knowing the nature of the lessee's ownership. In the first place, the policies of the United States in favor of conservation of national resources and prevention of monopolies require the Secretary to know the true owners of the lease. The Act provides, therefore, for full disclosure of the lessee's interest in order to prevent lease-grabbing through the use of strawmen. Second, for obvious reasons, it is administratively convenient for the Secretary to deal with the record owner as the true owner. In general, these policies and interests will necessarily be affected adversely by the common law's recognition of unwritten, undisclosed trusts arising from the breach of a fiduciary relationship unknown to the Secretary. On the other hand, the civilian antipathy to oral, hidden trusts and equitable liens works hand in glove with the policies and interests of the United States. Certainly in this case, Judge Wright's adjudication that McKenna and Pan-American have no provable claim to the lease represents the optimum Congress and the Secretary could expect in

administrative convenience and in the disclosure of outside interests.

Beyond all of this, a serious question exists as to whether the doctrine of separation of powers permits the judiciary, in effect, to force lessees upon the executive. And there is also the question whether the Act allows a court to select as assignees persons whom the Secretary has not investigated and formally approved. The policy objectives of the statute and its protective provisions may be easily circumvented, if courts have the power to reverse the Secretary's choice of lessee by recognizing third [fol. 2226] parties as the legal lessees by virtue of an unwritten option, assignment, or joint venture.

III.

In concluding that the issue for decision is a federal matter the Court, if I may say so, relied on this syllogism: (1) the federal Mineral Leasing Act permits options and assignments of leases approved by the Secretary; (2) here, in essence, the claims are an alleged option and an alleged assignment; (3) therefore the claims are a federal matter. This reasoning does not stand up.

The Court's conclusion is a glaring non sequitur, unless the terms "option" and "assignment" are taken to include contested, amorphous claims such as McKenna and Pan-American present. But this is an impossible construction of the Act. Congress could have intended only that the Secretary approve uncontested options and assignments or, possibly, such agreements validated by adjudication. If a court has decreed the validity of a formal lessee's total ownership of a lease against third persons, or, in another case, if a court should validate all or part of the transfer of a lessee's interest, it is difficult for me to understand what difference it makes to the United States whether the Court used state law or federal common law.

The Secretary has the ability to prevent a lease from falling into the hands of someone who should not have it.

The Secretary's determination that a lease or an assignment of a lease meets the requirements of the Act evidences compliance with the rules and regulations protecting [fol. 2227] the interests of the United States. That determination is unquestionably a federal matter. But the rights of action, if any, of McKenna and Pan-American against Wallis are state-created. And their validity or invalidity is determinable without regard to the Act, the regulations, or the Secretary's approval. In short, here, as in tax law or in federal procedure or in many other areas of the law where the nature of a litigant's interest unquestionably is important to the federal government—absent a conflict between the State and the Nation, accepted principles of federalism recognize that state law should determine the nature of the litigant's property interest, and federal law should determine the federal rules applicable to that particular type of property ownership.¹³

The Court's reasoning seems to overlook McKenna. McKenna claimed as a joint venturer, not as an assignee. I do not see how his claim can be lumped with Pan-American's claim. If the reference in the Act to secretarial approval of options and assignments makes a federal matter of all litigation touching such contracts, the statutory silence with respect to joint ventures should be taken to mean that McKenna's alleged joint venture with Wallis

¹³ Professor Hart comments: "But the decisions yield no simple rule of thumb for choosing. They cannot. Particularly is this so in the subtler situations in which federal legislation is building upon legal relationships established by the states and its power is one of characterization only and not of alteration of the substance of the relation. Federal tax law, for example, can say what state-created interests are to be taxed, and can characterize them in any way it chooses; but it cannot create the interests. Similarly, federal bankruptcy law can dissolve state-created interests in any way it thinks equitable; but it is hard to see how it can create, or recognize in liquidation, interests which never had any existence under state law." Hart, *The Relations Between State and Federal Law*, 54 Col. L. Rev. 489, 535 (1954).

is not a federal matter. I do not underscore this point. [fol. 2228] I mention it only to demonstrate that no special federal significance should be attached to the mention of "options" and "assignments" when it is manifest that the Secretary's approval of all original leases and all transfers is required under the Act.

IV.

After finding that the plaintiffs' claims were "federal matters", the Court still could not fashion and apply federal common law without first holding that application of state law would seriously affect adversely the interests of the United States. The Court managed this conclusion in just one sentence:

"We do not think the use of these devices [assignments and options] as a part of the scheme of carrying forth this public policy [the développement of our mineral resources and increasing our domestic reserves] should be limited by the interstitial restrictions imposed by the law of the State of Louisiana, which are not present in the other states."

The fact is, Louisiana imposes no special limitations, interstitial or otherwise, on assignments and options. Louisiana does require, as do common law states, that all contracts affecting immovables (real property), including mineral leases, be in writing. The Statute of Frauds is no stranger to the common law. The only pertinent Louisiana limitation affecting mineral leases is the rule against resulting and constructive trusts. This established civilian principle,—as a practical matter, a principle rarely called [fol. 2229] into operation—is the sole and narrow basis for the Court's holding that if state law is applied the Nation will suffer.

If this one-sentence finding on which the Court's decision rests is corrected and paraphrased realistically, the holding shakes down to this bizarre result:

Trusts *ex maleficio* are part of the congressional scheme for carrying out the national policies on mineral resources and monopoly. In litigation between private persons over the nature of the ownership of a federal mineral lease, as among themselves, national policies on mineral resources and monopoly will suffer unless courts recognize beneficial title to the lease in a claimant whom the Secretary has not investigated, has not approved as lessee, and may be unknown to the Secretary.

To restate this holding in accurate, realistic terms is to expose the unreal, speculative character of the Court's notion that federal common law controls this case.

V.

I find no decisional and no doctrinal support in the majority's position. I turn now to a small sampling of leading cases.

Clearfield Trust Co. v. United States, 1943, 318 U. S. 363, 63 S. Ct. 573, 87 L. Ed. 838, was the Supreme Court's first important decision on federal common law after *Erie*. [fol. 2230] The United States sued to recover on an express guaranty of prior endorsements on a government check containing a forged endorsement. The court held that state law was inapplicable. The United States was a party to the litigation, but more importantly since the right of the United States to recover for conversion of a government check is a federal right, the courts of the United States could properly formulate a rule of decision. Uniformity was desirable; state law would be "singularly inappropriate" because its application to commercial paper of the United States "would subject the rights and duties of the United States to exceptional uncertainty".

Mr. Justice Douglas, author of the *Clearfield* opinion has recently cast some doubt on its scope:

As respects the creation in the federal court of common-law rights, it is perhaps needless to state that we are not in the free-wheeling days antedating *Erie R. Co. v. Tompkins*, 304 U. S. 64. *The instances where we have created federal common law are few and restricted.* In *Clearfield Trust Co. v. United States*, 318 U. S. 363, we created federal common law to govern transactions in the commercial paper of the United States; and we did so in view of the desirability of a uniform rule in that area. *Id.*, p. 367. But even that rule was qualified in *Bank of America v. Parnell*, 352 U. S. 29. (Emphasis supplied.) *Wheedlin v. Wheeler*, 1963, 373 U. S. 647, 83 S.Ct. 1441, 10 L.Ed.2d 605.

[fol. 2231] This brings us to *Bank of America v. National Trust and Savings Association v. Parnell*, 1956, 352 U. S. 29, 77 S. Ct. 119, 1 L. Ed. 2d 93, one of the two authorities cited in the opinion on rehearing for the majority's principal holding. As in the instant case, *Parnell* was a diversity action between private persons. The suit was over stolen bearer bonds (in a general sense analogous to the lease here) issued by the Homeowners Loan Corporation, a federal agency, and guaranteed by the United States. The Bank sued to recover the value of the bonds Parnell had cashed. The Court held that federal law controlled the question whether the bonds were "overdue", because it related to the nature of the rights and duties of the Government. But the Court held also that state law controlled the question whether Parnell had met the burden of proving good faith. "Government securities" generate immediate interests of the Government, but the "present litigation is purely between private persons and does not touch the rights and duties of the United States". The possibility that "the floating of securities of the United States might somehow or other be adversely affected by the local rule of a particular State regarding the liability of a converter . . . is far too speculative, far too remote a possibility to

justify the application of federal law to transactions essentially of local concern". 352 U. S. at 33. See Wright, Federal Courts, § 60 at 216 (1963). Parnell is clearly contrary to the majority opinion.

Free v. Bland, 1962, 369 U. S. 663, 82 S. Ct. 1089, 8 L. Ed. 2d 180, turned on a specific Treasury regulation designed to make savings bonds attractive to purchasers by a survivorship provision eliminating the necessity for [fol. 2232] expensive or time-consuming probate proceedings. To allow state law to frustrate this purpose would permit the states to constrict money designed to help the federal treasury borrow money. In line with *Clearfield* and *Parnell*, the Court applied federal law. The Court made the following comment on *Parnell*, a comment appropriate here:

"[T]hat case [*Parnell*] held that, in the absence of any federal law, the application of state law . . . was permissible, *because the litigation between the two private parties there did not intrude upon the rights and duties of the United States*, the effect on the only possible interest of the United States—the floating of securities—being too speculative to justify the application of federal law."

In *Free v. Bland*, state law conflicted with a distinct federal rule the Treasury had consistently advocated and which supported the paramount interests of the United States.

Although United States was a party in *Clearfield* and its presence in litigation may in some cases be a factor, the principal teaching of *Clearfield*, *Parnell*, and *Free v. Bland*, as a group, is that federal common law is applicable when the state law substantially conflicts with the rights of the United States and where lack of uniformity causes "exceptional uncertainty" in determining the rights and duties of the United States.

Textile Workers Union of America v. Lincoln Mills of Alabama, 1957, 353 U. S. 448, 77 S. Ct. 912, 1 L. Ed. 2d [fol. 2233] 972, is not cited in the Court's opinion on rehearing but apparently is implicit in the Court's reliance on interstitial law-making. *Lincoln Mills* involved specific performance of an arbitration clause in a labor contract. Under § 301 of the Taft Hartley Act, federal courts have jurisdiction over suits on labor contracts affecting interstate commerce, although there is no specific provision about enforcing arbitration clauses. The Supreme Court held that § 301 was a mandate to fashion and apply a federal common law governing labor contracts. It should be remembered, however, that specific performance of arbitration agreements was prohibited by the law of Alabama, contrary to the strong congressional policy in favor of enforcement of labor arbitration. "To be consistent with that [congressional] policy you need to have specific performance of the arbitration agreement; that would bolster the policy rather than detract from it; so in this area the issue may be federal, that is, subject to federal common law rather than state law if that issue, though not covered squarely or impliedly by any federal statute or any federal treaty or constitutional provision, nevertheless would substantially affect the policy of such federal law." Morgan, *The Future of Federal Common Law*, 17 Ala. L. Rev. 10, 14 (1964). Again, as "Judge Rives [has] pointed out, there was behind *Lincoln Mills* a clear discernible federal policy in favor of collective bargaining agreements" and also "a huge body of federal labor law on which the courts draw in fashioning a substantive body of labor contract law".¹⁴ This is legitimate "interstitial legislation" because of discernible congressional policy. [fol. 2234] Dean Cowen, more accurately, calls it a "delegation" by Congress to the Judiciary of a portion of its

¹⁴ Morgan, *The Future of Federal Common Law*, 14 Ala. L. Rev. 10, 31 (1964).

legislative power.¹⁵ There is of course no federal policy touching resulting and constructive trusts of federal mineral leases; no substantial conflict between the state and federal policies; no clear mandate to fashion a federal substantive law of trusts *ex maleficio* affecting mineral leases.

The other case the Court relies on is *Francis v. Southern Pacific Co.*, 1948, 333 U. S. 445, 68 S.Ct. 611, 92 L. Ed. 798.¹⁶ But *Francis* lends no support to the majority. In *Francis*, the Supreme Court based its decision on the "accepted and well-settled construction of the Act" that the liability of an interstate carrier to one riding on a free pass was determined not by state law but by the Hepburn Act. This construction has been "unchallenged" in the Supreme Court and "in Congress too". The Transportation Act of 1940 reenacted the free pass provisions "without further change or qualification". The Court said, therefore, that it was "not writing on a clean slate"; "the long and well-settled construction of the Act plus reenactment of the free-pass provision without change of the established interpretation" had become "part of the warp and woof of the legislation". "State law which conflicts with this federal rule governing interstate carriers must therefore give way by virtue of the Supremacy Clause".¹⁷

¹⁵ *Id.* at 17.

¹⁶ A note, *The Competence of Federal Courts to Formulate Rules of Decision*, 77 Harv. L. Rev. 1084, 1090 (1964) contracts *Francis v. Southern Pac. Co.* with *Regents of the Universal System v. Carroll*: "The Supreme Court occasionally has been guilty of failure to inquire into the extent of the interest evinced by a federal statute 'involved' in a litigation. In *Francis v. Southern Pac. Co.*, for example, . . . In contrast with *Francis*, the Court made careful inquiry into the interest evinced by the legislation 'involved' in *Regents of the Univ. Sys. v. Carroll*. There it was held that although the Federal Communications Commission has authority to regulate the transfer of radio licenses, the construction of contracts transferring the control of a station or its property is governed by state law." See also *Wright*, *Federal Courts* § 60 at 218.

¹⁷ 333 U. S. at 450.

The "presence of a federal statute does not necessarily imply that there is a congressional intent that any particular issue be resolved by reference to federal law".¹⁸ The Federal Communications Act is unquestionably a comprehensive statute regulating a subject of national importance in which the United States has an overriding interest. Just as the Mineral Leasing Act regulates the issuance and transfer of federal mineral leases, the Communication Act regulates the issuance and transfer of radio licenses. *Regents of the University System of Georgia v. Carroll*, 1950, 338 U. S. 586, 70 S.Ct. 370, 94 L. Ed. 363, concerned the construction of a contract transferring the licensee's control of its radio station to a broadcasting company. When the licensee repudiated the contract, the [fol. 2236] broadcasting company sued for an accounting. The Court held that state law governed the relationship between the parties as established by the contract between the parties. The Court's reasoning is clearly applicable to the parallel situation the instant case presents:

"Congress has enabled the Commission to regulate the use of broadcasting channels through a licensing power.

¹⁸ Note, The Competence of Federal Courts to Formulate Rules of Decision, 77 Harv. L. Rev. 1084, 1090 (1964). "Although Congress has in rare instances delegated to the judiciary the authority to create a comprehensive body of decisional law in a particular area, the role of the courts is ordinarily interpretative and implemental. The exercise of this judicial competence is premised on the inevitable incompleteness of legislation. A statute may be sufficiently vague that its application to a particular controversy is unclear; it may have omitted ancillary but necessary procedural rules; or it may have created a cause of action whose elements are defined only in general terms, leaving refinements to the judiciary. In these cases it is the task of the judiciary to fill in the legislative lacunae in the manner most compatible with the statutory framework. The scope of judicial lawmaking varies inversely with the clarity of the policies discernible from the statute and its legislative history, but judicial lawmaking competence is properly limited to issues in which the congressional program evinces a legislative interest." *Id.* at 1089.

... The Commission may impose on an applicant conditions which it must meet before it will be granted a license, but the imposition of the conditions cannot directly affect the applicant's responsibilities to a third party dealing with the applicant. . . . We do not read the Communications Act to give authority to the Commission to determine the validity of contracts between licensees and others." 338 U. S. at 600, 602.

Within the scope of its objectives as a mineral leasing law, the Act here is comprehensive and no doubt has many interstices to be filled, in the proper case, by judicial resort to federal common law. But the Act does not purport to go beyond the lessee and lessor. The Secretary, like the Federal Communications Commission, may impose conditions that the lessee must meet, but the Secretary, although interested in disclosure of the nature of the lessee's interest, has not tried to affect the legal relationship of the lessee to third parties. The controversy between the litigants, as it did in *Carroll*, takes place outside the Act, not within an interstice of the Act.

[fol. 2237] The only case squarely in point is *Blackner v. McDermott*, 10 Cir. 1949, 176 F.2d 498, which the Court noted as "involving a claim of 'joint venture' highly similar to McKenna's claim here", but declined to follow. The Tenth Circuit applied the law of Wyoming for the reason I would apply the law of Louisiana: the issue was "the relationship of the parties each to the other in respect of the leasehold estate".

Decisions in this circuit in the area of federal decisional law are not distinguished for their consistency.

In *United States v. Sylacauga Properties, Inc.*, 5 Cir., 1963, 323 F.2d 487, we held that state law was inapplicable in a suit to foreclose an FHA mortgage under the National Housing Act. See also *United States v. Taylor*, 5 Cir. 1964, 333 F.2d 633, holding that federal law rather than state law applies to the interpretation of a disputes clause in a contract between private parties where there is a

sufficient federal interest. The federal interest was in controlling and effecting prompt settlement of disputes between a sub-contractor and a prime contractor engaged in construction work for the Atomic Energy Commission. But see *United States v. Yazell*, 5 Cir. 1964, 334 F.2d 454, an action to recover on a note for a loan from the Small Business Administration. This Court held, surprisingly, perhaps, that the capacity of a married woman to contract with the federal government is controlled by state law, notwithstanding the effect such a decision might have on the administration of the national program for assistance to small business.

[fol. 2238] *Leiter Minerals, Inc. v. United States*, 5 Cir. 1964, 329 F.2d 85; affirmed subject to abstention, 1957, 352 U.S. 220, 77 S. Ct. 287, 1 L.Ed.2d 267, cannot be reconciled with the majority's holding in the instant case. In 1935, the United States, acting under the Migratory Bird Conservation Act, contracted to purchase almost 9000 acres of land in south Louisiana. The seller reserved the minerals for a ten-year period with provisions for extensions of five years so long as certain minimum use was made of the rights. In Louisiana the sale or reservation of mineral rights establishes only a servitude or right to extract the minerals. Servitudes prescribe in ten years for nonuse, a prescription that cannot be avoided by contract. In 1938, before the conveyance, the Louisiana legislature adopted a statute providing that prescription of mineral rights should not run against the State or United States. This legislation was replaced by Act 315 of 1940 restricting the exemption to the United States. The Louisiana court held that Act 315 would not apply if the deed provided for a mineral servitude for fixed term, but would apply if the term were indefinite. *Leiter Minerals, Inc.*, successor to the seller of the land, filed suit in 1953 to have itself declared owner of the mineral rights. The United States then filed suit to quiet title. This Court, applying state law, held that the reservation was for an indefinite term. Here, therefore, we have the United States a party to the liti-

gation concerning its rights under a contract entered into pursuant to a federal statute. Directly affected are national policies under that statute, policies relating to the conservation of our national resources, and settled policies of federal land acquisition. Presumably the Govern-[fol. 2239] ment paid more to obtain the favorable term. "It seems reasonable to assume a congressional intent that rights for which the Government has paid not be taken away by operation of special state legislation directed against the United States." Note, 78 Harv. L. Rev. 891, 895 (1965). Finally, the case involved state legal concepts exceptionally complex and foreign to common law concepts. I must say, if federal common law applies in the case now before this Court, *Leiter Minerals, Inc.* was an *a fortiori* case for federal common law. This Court held otherwise:

"We have no doubt that the Congress could make federal law applicable, but we are equally clear that it had no intention to do so when it merely authorized the contract by which the United States acquired the property. State law must govern in the absence of a federal statute making federal law applicable. . . . [T]he rules of decision act always has had 'application to state laws, strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intra-territorial in their nature and character.' *Swift v. Tyson*, 1842, 41 U.S. (16 Pet.) 1, 18, 10 L.Ed. 865." *Leiter Minerals, Inc. v. United States*, 5 Cir. 1964, 329 F.2d 85, at 90.

[fol. 2240] In sum, I can find no decisional or doctrinal justification for applying judge-made federal common law to a private dog-fight in which the federal government's interest, if any, seems to me to be that of a bored spectator. The speculation that trusts ex maleficio are part of the con-

gressional scheme for conserving natural resources hangs by too fine a thread for me to see the connection. Under *Erie* and the Rules of Decision Act, Louisiana may decide for itself whether to preserve its civil law institutions or adopt alien institutions. The philosophy that brought American federalism into being keeps the national government out of local transactions involving only the determination of the nature of the legal relation of one person to another.

[fol. 2241] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 2242]

SUPREME COURT OF THE UNITED STATES

No. 341, October Term, 1965

FLOYD A. WALLIS, Petitioner,

v.

PAN AMERICAN PETROLEUM CORPORATION, ET AL.

ORDER ALLOWING CERTIORARI—October 11, 1965

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is placed on the summary calendar. The Solicitor General is invited to file a brief expressing the views of the United States.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office-Supreme Court, U.S.
FILED

JUL 12 1965

JOHN J. HAWK, CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 341

FLOYD A. WALLIS,

Petitioner,

versus

PAN AMERICAN PETROLEUM CORPORATION,
Respondent.

FLOYD A. WALLIS,

Petitioner,

versus

PATRICK A. McKENNA,
Respondent.

(Pan American Petroleum Corporation, Initially A Co-
Defendant With Wallis)

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT.**

C. ELLIS HENICAN,
MURRAY F. CLEVELAND,
Suite 2601, 225 Baronne Street,
New Orleans, Louisiana 70112;

H. M. HOLDER,
1300 Beck Building,
Shreveport, Louisiana 71101,
Attorneys for Petitioner.

INDEX

	Page
A. OPINIONS BELOW	2
B. JURISDICTION	2
C. QUESTIONS PRESENTED FOR REVIEW ..	3
D. STATUTES AND CONSTITUTIONAL PRO- VISIONS INVOLVED	7
E. STATEMENT OF CASE	7
F. REASONS FOR ALLOWANCE OF WRIT AND SUPPORTING ARGUMENT	16
I. The questions involved are important	18
II. The comprehensiveness of the Mineral Leasing Act, and, the need for uniformity—as opposed to the proviso of Section 32 of the Act reserv- ing the right to the states “to exercise any rights” which they may have	22
III. The original opinion of the majority below and the <i>Boesche</i> case, in light of decisions concern- ing the Public Land Laws, generally, and the decisions interpreting the Mineral Leasing Act	32
A. The decisions relating to the Public Land Laws as respects the nature of inceptive rights while the legal title remains in the United States	33
B. Decisions relating to the Public Land Laws as respects the equitable power of the courts and the application of federal law	40
C. Decisions relating to and interpreting the Mineral Leasing Act, are contrary to the decision below	49

INDEX—(Continued)

	Page
D. The <i>Boesche</i> case as it relates to private transactions had by a mineral lessee with third parties, does not support the decision below	59
IV. The majority opinion below on petitions for rehearing and the devices of "assignments" and "options"	63
A. Section 30 of the Act relative to the Secretary's approval of assignments or subleases, as interpreted by the decision below, is contrary to past decisions interpreting the Leasing Act, and, is contrary to Sec. 30 (a) of the Act	66
B. Recognition by the Leasing Act of "options" as concomitants to the public policy against monopoly	73
G. CONCLUSION	76
CERTIFICATE OF SERVICE	77
 Appendix:	
Additional statutes involved	79
District Court opinion	100
Court of Appeals opinion	113
Judgment	127
Court of Appeals opinions and order denying rehearing	129
Letter Agreement between Wallis and McKenna ..	159
Option Agreement between Wallis and Pan Am ...	160

CITATIONS.

Cases.	Page
Alabama v. Texas, 347 U. S. 272	33
Alaska Consolidated Oil Fields v. Rains, 54 F. 2d 868	18, 55
Bank of America National Trust & Savings Assn. v. Parnell, 352 U. S. 29	28
Best v. Humboldt Mining Co., 371 U. S. 334	33, 58
Black v. Elkhorn Mining Co., 163 U. S. 445	39
Black v. Jackson, 177 U. S. 349	37
Blackner v. McDermott, 176 F. 2d 498	3, 16, 56, 71
Boesche v. Udall, 373 U. S. 472 17, 19, 32, 33, 34, 35, 50, 59	
Bohall v. Dilla, 114 U. S. 47	43
Buscher v. Buscher, 231 U. S. 157	39
California Company v. Udall, 296 F. 2d 384	64
Cameron v. U. S., 252 U. S. 450	38
Clearfield Trust Co. v. U. S., 318 U. S. 363	54
Davies Warehouse Co. v. Bowles, 321 U. S. 144 ...	25
Ducie v. Ford, 138 U. S. 587	18, 39, 48, 54
Farmers Union v. WDAY, 360 U. S. 525	27
Forbes v. Gracey, 94 U. S. 762	38
Francis v. Southern Pacific Co., 333 U. S. 445	26
Free v. Bland, 369 U. S. 663	29
Gauthier v. Morrison, 232 U. S. 452	36

CITATIONS—(Cases Continued)

	Page
Gibbons v. Pan American Petroleum Corporation, 262 F. 2d 852	18, 71
Hamilton Foundry & M. Co. v. International M. & F. Wkrs., 193 F. 2d 209, cert. denied 343 U. S. 966	31
Hodgson v. Federal Oil and Development Co., 274 U. S. 15	18, 49
Irvine v. Marshall, 61 U. S. (20 How.) 558	5, 16, 44
Irvine v. Marshall and Barton, 7 Minn. 286	44
Isaacs v. De Hon, 11 F. 2d 943	18, 70
Johnson v. Towsley, 80 U. S. 72	18, 41
Land v. Dollar, 330 U. S. 731	3
Lytle v. Arkansas, 63 U. S. (22 How.) 193	37
Manuel v. Wulff, 152 U. S. 505	42, 69
Marquez v. Frisbie, 101 U. S. 473	18, 38, 42, 43
McCune v. Essig, 199 U. S. 382	39
McKenna (Pan Am) v. Wallis, 200 F. Supp. 468	2
Mid-Northern Co. v. Walker, 268 U. S. 45	24
Morgan v. Udall, 306 F. 2d 799, cert. denied 371 U. S. 941	11, 45
Myers v. Croft, 80 U. S. 291	35
Oldland v. Gray, 179 F. 2d 408, cert. denied 339 U. S. 948	18, 42, 56, 71

CITATIONS— (Cases Continued)

	Page
Pan American Petroleum Corporation v. Pierson, 284 F. 2d 649, cert. denied 366 U. S. 936.....	18, 57
Paul v. U. S., 371 U. S. 245.....	26, 28
Radio Station WOW v. Johnson, 326 U. S. 120.....	27
Rector v. Gibbon, 111 U. S. 276.....	41
San Diego Unions v. Garmon, 359 U. S. 236.....	29
Standard Oil Co. of California v. U. S., 107 F. 2d 402, cert. denied 309 U. S. 654.....	33, 43
Steel v. St. Louis Smelting and Refining Co., 106 U. S. 447.....	43
St. Louis Smelting and Refining Co. v. Kemp, 104 U. S. 636.....	43
Textile Workers v. Lincoln Mills, 353 U. S. 448....	30
The Leiter Minerals, Inc., v. U. S., 329 F. 2d 85... 28, 53	
U. S. v. Buchanan, 232 U. S. 72.....	18, 35, 48
U. S. v. Certain Property, etc., 306 F. 2d 439.....	26, 54
U. S. v. General Motors, 323 U. S. 373.....	3
U. S. v. Standard Oil Co., 332 U. S. 301.....	21
U. S. v. Trinidad Coal & Coking Co., 137 U. S. 160	35
Utah Power & Light Co. v. U. S., 243 U. S. 389... 33	
Williams v. U. S., 138 U. S. 514.....	40, 46, 58, 67
Wilson v. Cook, 327 U. S. 474.....	26
Witbeck v. Hardeman, 51 F. 2d 450, affirmed 286 U. S. 444.....	18, 55, 71

CONSTITUTION, STATUTES AND REGULATIONS.

U. S. Constitution:	Page
Article I, section 8, clause 17	7, 26
Mineral Leasing Act of 1920; Act of February 25, 1920; 41 Stat. 437; 30 U.S.C.A. 181, et seq.	3, 7, 79
Section 1	70, 79
Section 17 (as amended in 1935)	61, 80
Section 18 (as originally enacted)	50, 80
Section 27 (as amended in 1946)	73, 74, 82
Section 27 (as amended in 1948)	85
Section 27 (as amended in 1954)	72, 92
Section 28	62, 92
Section 30	29, 66, 67, 68, 69, 70, 72, 93
Section 30(a)	31, 66, 67, 68, 69, 94
Section 32	6, 17, 21, 22, 23, 26, 28, 29, 34, 96
Mineral Leasing Act For Acquired Lands; Act of August 7, 1947; 61 Stat. 913; 30 U.S.C.A. 351, et seq.	3
Mining Law of May 10, 1872, c. 152, § 3 and § 5, 17 Stat. 91, 92; R.S. §§ 2322 and 2326; 30 U. S. C. A. 26, 28	7, 62, 96
28 U. S. C. 1254(1)	3
Texts and Miscellaneous:	
77 Harvard Law Review 1084	21

TEXTS AND MISCELLANEOUS—(Continued)

	Page
"In Praise Of Erie—And Of The New Federal Common Law," Volume 19, The Record Of The Association Of The Bar Of The City of New York, page 64	22
"Oil and Gas Leases On United States Government Lands," Ross L. Malone, Jr., 2nd Ann. Institute On Oil And Gas Law And Taxation, Southwestern Legal Foundation, page 309, 324, et seq.	73
79th Congress, 2nd Session, Volume 92, Congressional Record, page 10222 (1946)	66, 69
Report of the Committee on Public Lands, to the House of Representatives; on "Amending The Mineral Leasing Act Of February 25, 1920, As Amended," Report No. 2446, 79th Congress 2nd Session, H. Repts., 79-2, vol. 7-98	66
"Bank of America," 59 I.D. 412 (1947)	70
Hill v. Williams and Liddell, 59 I.D. 370	66
Opinion by Solicitor of Department of Interior to the Assistant Secretary of Interior dated January 12, 1945, 59 I.D. 4	49, 63, 73

THE HISTORY OF THE UNITED STATES OF AMERICA

BY JAMES M. SMITH

IN TWO VOLUMES

VOLUME I

THE FOUNDING OF THE NATION

1776-1789

NEW YORK: THE UNIVERSITY PRESS

1900

THE UNIVERSITY PRESS

NEW YORK

1900

THE UNIVERSITY PRESS

NEW YORK

1900

THE UNIVERSITY PRESS

NEW YORK

1900

THE UNIVERSITY PRESS

NEW YORK

1900

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. _____

FLOYD A. WALLIS,

Petitioner,

versus

PAN AMERICAN PETROLEUM CORPORATION,

Respondent.

FLOYD A. WALLIS,

Petitioner,

versus

PATRICK A. McKENNA,

Respondent.

(Pan American Petroleum Corporation, Initially A Co-
Defendant With Wallis)

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT.**

Floyd A. Wallis, appellee below, petitions for a writ
of certiorari to review the judgment of the United States
Court of Appeals for the Fifth Circuit entered on Jan-

uary 21, 1964, in the above cases, which involve identical or closely related questions, and which cases were consolidated in the District Court and the Court of Appeals.¹

A. OPINIONS BELOW.

The opinion of the United States District Court for The Eastern District of Louisiana, New Orleans Division (App., *infra*, p. 101; R. p. 1847) is reported at 200 F. Supp. 468. The original opinions of the United States Court of Appeals for the Fifth Circuit (App., *infra*, pp. 113, 123; R. pp. 1978, 1989) are reported at 344 F. (2d) 432 and its opinions on petitions for rehearing filed on behalf of all parties (App., *infra*, pp. 129, 137; R. pp. 2209, 2218) are reported at 344 F. (2d) 439.

B. JURISDICTION.

The judgment of the Court of Appeals was dated and entered January 21, 1964 (App., *infra*, pp. 127, 128). A timely petition for rehearing by Wallis, appellee, was denied by order dated and entered April 21, 1965 (App., *infra*, pp. 129, 137). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1), which provides^{1a} that cases in the Courts of Appeal may be reviewed by this Court, "by writ of certiorari granted upon the petition of any party to any civil . . . case, . . . after rendition of judg-

¹ These cases involve two sets of facts, and in addition the Court below rendered two opinions, each based on a different predicate. In light of these considerations, every effort has been made to comply with the requirement of "brevity," as contained in Rule 23, of the Rules of this Court.

^{1a} § 1254. Courts of appeals; certiorari; appeal; certified questions. Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal cases, before or after rendition of judgment or decree; * * *

ment or decree." While the decree below was not a final judgment, in that it remanded the cases for trial "on all issues under the applicable principles of federal law," yet under these circumstances, this Court has held that it has jurisdiction to review, and will review, where the decision of the Court below is contrary to the decision of another Court of Appeal and such decision "is fundamental to the further conduct of the case," *U.S. v. General Motors Corp.*, 323 U.S. 373, 377 (1944), and *Land v. Dollar*, 330 U.S. 731 (1947). Such is the case at bar, for the majority opinion below **concedes** the decision is contrary to the decision in *Blackner v. McDermott*, 176 F. (2d) 498 (C.C.A., 10th, 1949),² and, since the remand is for trial on **all** issues "under applicable principles of federal law," it is necessarily "fundamental to the further conduct of the case," particularly as respects the doctrine of "the law of the case."

C. QUESTIONS PRESENTED FOR REVIEW.

In June of 1954, Wallis filed five "acquired lands" applications seeking issuance of noncompetitive oil and gas leases on Federal lands in Louisiana, pursuant to The Mineral Leasing Act For Acquired Lands (hereafter referred to as 1947 Act).³

² Circuit Judge Wisdom in his dissenting opinion on rehearing maintains the decision is contrary to additional decisions, including one by the Fifth Circuit.

³ Act of August 7, 1947; 61 Stat. 913; 30 U.S.C.A. 351, *et seq.* As respects lands owned by the United States and the granting of oil and gas leases thereon, Congress has passed two statutes, the 1947 Act and The Mineral Leasing Act of 1920 (hereafter referred to as 1920 Act); Act of February 25, 1920; 41 Stat. 437; 30 U.S.C.A. 181, *et seq.* The distinction between the two Acts as noted (Footnotes 7 and 9, *App., infra*, p. 104) by the trial Court is: "'Acquired land,' as the term implies, is land obtained by the United States through purchase or other transfer from a state or a private individual

Prior to these filings, in March, Wallis and McKenna reached an oral agreement by telephone with reference to these "acquired lands" applications, and leases to be issued "under" them, which oral agreement was confirmed by a written letter agreement (App., *infra*, p. 159) dated December 27, 1954.

Prior to Wallis having filed his "acquired lands" applications, one Henry S. Morgan had filed applications for leases **under both the 1947 Act and the 1920 Act**, purporting, in each set of applications, to describe⁴ the same property as that in Wallis' applications. A contest in the Department of Interior ensued between Morgan and Wallis over the merits of their respective "acquired lands" applications, with Morgan's "public domain" application under the 1920 Act lying dormant. During the pendency of this contest, and on March 3, 1955, Wallis executed an option agreement (App., *infra*, p. 160) with Pan American Petroleum Corporation (hereafter called "Pan Am") granting it the option to acquire leases issued to Wallis "under and by virtue" of his "acquired lands" applications. Approximately a year later, in March, 1956, Wallis filed a "public domain" application for a lease on the lands under the 1920 Act, and a contest then ensued with Morgan over their respective "public domain" applications. Wal-

and normally dedicated to a specific use. Land owned by the United States by virtue of its sovereignty is called 'public domain land.' . . . The original Mineral Leasing Act of 1920, . . . , with certain exceptions not here relevant, applied only to public domain lands . . . Enacted to remedy this deficiency, the 1947 Act in terms applies only to 'acquired lands' not subject to lease under the 1920 statute. . ." *The trial Court further noted* (App., *infra*, p. 104) that "the parties all agree" that if lands are in fact "public domain," an application under the "acquired lands" 1947 Act is "ineffective," and, *vice versa*.

⁴ The Department of Interior ultimately held the purported descriptions in Morgan's applications, to be faulty and not in compliance with the law.

lis' "public domain" application ultimately prevailed, and in December, 1958, he was issued a "public domain" lease pursuant to the 1920 Act, being Lease No. B.L.M. 042017 of the Department of Interior.

Despite the fact that the written agreements only related to the "acquired lands" applications, nevertheless separate suits were instituted by McKenna and Pan Am seeking to impress such written agreements upon Wallis' "public domain" lease.⁵

The claim sustained below is that all issues should be decided under "applicable principles of Federal law."⁶ In the context of the foregoing, the questions presented for review are:

1. The extent to which the issues involving these private contracts, are governed by Federal law as opposed to local law, including the issues of (1) the formal validity of the private contracts, (2) the applicability of the Statute of Frauds, (3) the applicability of the parol evidence rule,

⁵ McKenna asserted that he and Wallis were engaged in a "joint venture" to obtain leases. He joined Pan Am as a co-defendant with Wallis, because of the execution of the option agreement (App., *infra*, p. 160) with Pan Am.

⁶ While the issue was not raised, nevertheless Trial Judge J. Skelly Wright considered the possibility of the applicability of Federal law but concluded the case should be decided in accordance with local law and ruled in favor of Wallis in both suits. On appeal, and for the first time, McKenna and Pan Am asserted the applicability of Federal law. On original hearing, the majority of the Court ruled (Judge Wisdom dissenting) that the parties' rights should be determined in accordance with Federal law and ordered a remand for trial in accordance therewith (App., *infra*, pp. 122, 128). Primary reliance was placed upon decisions of this Court dealing with disposal of Federal lands under the Public Land Laws, particularly the case of *Irvine v. Marshall*, 61 U. S. (20 How.) 558 (1858). In denying petitions for rehearing, further written opinions (Judge Wisdom dissenting) were filed (App., *infra*, p. 129), the majority concluding "that our opinion should be more closely tied to" the 1920 Act, and then held that the "policy" underlying the 1920 Act required "uniformity" in its application.

(4) what constitutes a breach thereof, (5) the substantive and operative effect of the private contracts, and (6) the equitable remedies in the event of a breach of such private contracts? For while the majority acknowledged "the right of action was created by state law," yet it remanded for trial "on **all issues** under the applicable principles of federal law,"⁷

2. The extent to which the Mineral Leasing Act of 1920 requires "uniformity" in the adjudication of all issues relative to these private contracts and precludes the applicability of local law, in light of § 32 thereof (App., *infra*, p. 96), which reads in part, as follows: "... Nothing in this Act shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States," and

3. What interstitial authority or function is vested in Federal Courts by the Mineral Leasing Act, where Congress by § 32 of the Act (App., *infra*, p. 96) has delegated to the Secretary, authority "to prescribe necessary and proper rules and regulations and **to do any and all things necessary to carry out and accomplish the purposes of**" the Act?⁸

⁷ All emphasis appearing in this petition has been supplied unless otherwise noted.

⁸ The more important subsidiary questions comprised in these questions for review are: (1) whether or not the owner of a Federal oil and gas lease has "rights" which constitute "property" and are thus subject to local law in accordance with past decisions of this Court and the Circuit Courts, including the Fifth Circuit? and (2) whether or not past decisions of this Court interpreting the Public Land Laws, generally, are applicable to the interest owned by a lessee under a Federal oil and gas lease?

D. STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

Constitution of the United States:

Article I, Section 8, Clause 17:

§ 8.—The Congress shall have power . . . ,

To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings; * * *

Mineral Leasing Act of 1920; Act of February 25, 1920; 41 Stat. 437; 30 U.S.C. 181:

The pertinent portions of this Act are set forth in Appendix, *infra*, pp. 79-96.

Mining Law (30 U.S.C. 26, 28; R.S. 2322, 2326):

The pertinent portions of this Act are set forth in Appendix, *infra*, pp. 96-99.

E. STATEMENT OF CASE.

For several years prior to 1954, Wallis was individually engaged in the oil business at New Orleans, Louisiana, and he set out to obtain leases on Federal lands in Plaquemines Parish, Louisiana. At the time, McKenna was working on another matter for Wallis before the

Department of Interior (admitted by McKenna to be in the capacity of Wallis' agent), and Wallis instructed McKenna to check the records of the Bureau of Land Management (hereafter referred to as "B.L.M.") as to a number of tracts, to see if they were "open" for leasing. During this search, Wallis decided to concentrate on one particular tract which seemed to be "open," and set about preparing five "acquired lands" applications for leases pursuant to the 1947 Act.

In March of 1954, when the five applications were ready for filing, Wallis called McKenna and reached an oral understanding with McKenna concerning the applications and leases which might issue to Wallis "under" the said applications, with McKenna to have an interest therein. This understanding "was finally reduced to writing in a letter (App., *infra*, p. 159) from Wallis dated December 27, 1954, approved by McKenna on January 3, 1955."⁹ Simultaneously with the execution of this letter agreement, McKenna executed five powers of attorney¹⁰ agreeing to act as Wallis' **agent** in connection with the five applications and these were filed with the B.L.M. In connection with this agreement with McKenna, McKenna testified that he agreed "to handle all matters here with the Department of Interior and whatever agency might be involved"¹¹ . . . It was contemplated I would do anything necessary."¹² In fact McKenna was not an attorney-at-law and was not even qualified to practice before the

⁹ District Court, App., *infra*, p. 103.

¹⁰ Items 22 to 26, both inclusive, Wallis' Note of Evidence. These were prepared by McKenna for Wallis' signature. These documents appear in the Record as original papers.

¹¹ R. p. 1513.

¹² R. p. 1516.

Department of Interior, for in 1952 McKenna had specifically been denied this right.¹³

One Henry S. Morgan had filed "acquired lands" applications for leases, **prior** to the filing of Wallis' applications, purporting to describe the same property, and it was necessary for Wallis to initiate a contest in the Department of Interior with Morgan, by filing a "protest" as respects Morgan's "acquired lands" applications. Although McKenna had "agreed to handle all matters here with the Department," he could not practice there, and so he resorted to the device of prevailing upon Wallis to employ Mastin White to handle the "protest," on the representation that White was an "expert" and a "protest" was a very highly technical matter—with Wallis and McKenna to share in paying White's fee for such services. Without Wallis' knowledge or consent, McKenna told White the protest need be only "*pro forma*."¹⁴ The "protest" was filed by White in January of 1955, initiating the contest with Morgan.

In February of 1955, Wallis began to have discussions with A. D. Campbell, an employee of Pan Am, about the possibility of Pan Am's acquiring an option upon leases which might issue to Wallis, pursuant to his "acquired lands" applications. They arrived at the terms of an agreement, which were communicated to Percy Sandel, Pan Am's house counsel, with instructions to prepare an agreement, which he did, and it was executed on March 3, 1955 (App., *infra*, p. 160). During the confection of this transaction, Pan Am, through Sandel, had Mr. Neil

¹³ Cf. Item 158 of Wallis' Note of Evidence. Original Papers.

¹⁴ Cf. White's letter of September 6, 1955, Item 55, Wallis' Note of Evidence. Original Papers.

Stull, its Washington, D. C., attorney and expert on B.L.M. matters, check the transaction (including Wallis' contest with Morgan) at the B.L.M.

Shortly after the execution of the Pan Am option agreement, Wallis' "protest" of Morgan's applications was denied, and Wallis appealed within the Department to the Director, before whom the matter was briefed and submitted. Unbeknown to Wallis, Pan Am's expert, Mr. Neil Stull, collaborated with Mr. White on the brief submitted to the Director.¹⁵ While the matter was still pending on appeal, Mr. White had to withdraw, and Wallis employed new counsel, Mr. Harry Edelstein, a former Assistant Solicitor of the Department of Interior. Edelstein reviewed the work done by Mr. White in connection with the appeal concerning the "acquired lands" applications, and he agreed with Pan Am's attorney, Mr. Stull, that White's work could not "be improved upon," and testified there was nothing further that he could do, or did, towards prosecuting the pending appeal. However, in reviewing the records in the B.L.M. he noted that Henry S. Morgan at the time he filed his "acquired lands" applications, had

¹⁵ As respects his participation, Mr. Neil Stull advised Pan Am, in part, as follows: "... As you are aware, Mr. Wallis is represented in Washington by Mr. Mastin G. White, and I have had a number of conferences with Mr. White relative to the case. *Mr. White has very kindly permitted me to participate in the handling of the case, and he has included several suggestions I have made in a brief which he has just filed with the Director of the Bureau of Land Management in support of his protest against the allowance of the Morgan application. I have reviewed Mr. White's brief very carefully, and I do not believe that it can be improved upon. Mr. White has adopted several suggestions I have made, and his brief meets with my complete approval. I do not believe that I could raise any points which have not been raised by Mr. White, hence I see no reason why we should attempt to intervene in the case, at least at this time . . .*" Original Exhibits, "Sandel X-3," letter dated August 4, 1955, written by Neil Stull.

also filed "public domain" lease applications under the 1920 Act, as respects the same lands. Morgan's "public domain" applications had been lying dormant, but Edelstein suggested¹⁶ Wallis also file a "public domain" application, as a precautionary matter. This was done in March of 1956, and Edelstein filed a "protest" on behalf of Wallis as respects Morgan's "public domain" applications.

In April of 1956, Wallis disassociated himself from McKenna, and advised McKenna that he was terminating his agreement with McKenna, for reasons which need not be elaborated upon.

In June of 1956, the Director, of his own motion and without notice to the parties, consolidated the contest between Wallis and Morgan as respects the "public domain" applications, with their contest over the "acquired lands" applications, thus bypassing the initial administrative level, and he then ruled the lands in question to be "public domain" lands, rejected both Wallis' and Morgan's "acquired lands" applications, and ruled Morgan's "public domain" applications defective, holding Wallis entitled to a "public domain" lease under the 1920 Act. This decision was ultimately sustained by the Secretary of the Interior,¹⁷ and the lease No. B.L.M. 042017 was issued to Wallis in December of 1958.

Despite the fact of the letter agreement (App., *infra*, p. 159) between Wallis and McKenna, and, the

¹⁶ We need not burden this account with the dispute as to who discovered the Morgan applications, and, suggested Wallis file a "public domain" application—McKenna or Edelstein. The trial Court did not resolve the dispute.

¹⁷ The Secretary's ruling was affirmed by the Court. Cf. *Morgan v. Udall*, 306 F. 2d 799, and writ was refused, 371 U. S. 941.

simultaneously executed powers of attorney where McKenna had agreed to act as Wallis' agent, plus the fact that the letter agreement was restricted to the "acquired lands" applications,¹⁸ McKenna filed suit alleging a joint venture agreement with Wallis, seeking to utilize parol and extrinsic evidence to maintain the joint venture and impose it upon the "public domain" lease held by Wallis.

The jurisdictional predicate for McKenna's suit was diversity of citizenship, he alleging in Article I of his complaint (R. p. 2), that McKenna was a citizen of Washington, D. C., Wallis a citizen of Louisiana, and Pan Am was a corporation organized under the laws of Delaware, and that "the matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand (\$10,000.00) Dollars." While McKenna prayed for declaratory relief, in effect he was asking for specific performance. Wallis interposed as defenses (1) a denial of a joint venture, asserting McKenna was employed as his agent,¹⁹ (2) the local Statute of Frauds, (3) the parol evidence rule, (4) fraud and/or a failure of consideration or lack of contractual capacity, all based upon McKenna's agreement to "handle all matters here with the Department of Interior . . . It was contemplated I would do anything necessary"—when McKenna could not and did not render such services, since he was not admitted to practice before the Department.²⁰

¹⁸ The trial Court said: "Indeed, Wallis' letter to McKenna which embodies their agreement, traces almost literally the language of McKenna's prior letter requesting written confirmation of his interest." (App., *infra*, footnote 18, p. 109.)

¹⁹ The trial Court did not deem it necessary to decide this issue. Cf., App., *infra*, p. 103, ft. n. 4.

²⁰ The trial Court did not deem it necessary to decide this issue. Cf. App., *infra*, p. 111, ft. n. 24.

Despite the fact that the option agreement with Pan Am (App., *infra*, p. 160) was restricted to the "acquired lands" applications and leases which might issue to Wallis "under and by virtue of" **these applications**, Pan Am brought suit for specific performance of the option agreement, seeking to impose it upon Wallis' "public domain" lease. In attempting to maintain its claim, Pan Am (1) placed emphasis upon Paragraph II of the option agreement (App., *infra*, p. 162) and its provision concerning "diligent efforts,"²¹ (2) relied upon an alleged contemporaneous conversation between Wallis and Pan Am's house counsel, Sandel, at the time of the signing of the option agreement, supposedly concerning Morgan's "public domain" applications,²² and (3) urged some type of estoppel based upon the "diligent efforts" provision of the option agreement coupled with the assertion that Wallis

²¹ The trial Court said: "Much is made of a second paragraph of the option agreement where Wallis promises, in general terms, to 'make diligent efforts' to obtain a lease over the lands covered by the applications. But that provision does not purport to enlarge the scope of the grant. (footnote) . . . Standing alone, this provision would convey nothing. It merely imposes an additional duty, supplementing the fundamental obligation recited in the first paragraph. Nor does it throw light on the subject matter of the contract. On the contrary, being a mere accessory stipulation, its apparently general terms must be considered qualified by paragraph I, which indicates precisely 'the things concerning which * * * the parties intended to contract.' . . ." (App., *infra*, p. 107).

²² The trial Court refused to believe Sandel, and held no such conversation took place, saying: "Though Campbell, the Pan American agent who negotiated the option 'deal' with Wallis, makes no such claim, Sandel, the attorney who drafted the contract, insists that paragraph II of the contract was inserted, inter alia, to cover the contingency that a public domain lease might be issued to Wallis, after the latter alerted him to that possibility by mentioning that Morgan had filed both types of application. But all the evidence, including Sandel's own correspondence, contradicts that assertion. Moreover, it is difficult to understand why the draftsman was not more explicit if apprized of the contingency and intending to provide for it. Under the circumstances, the allegation must be rejected . . ." (App., *infra*, p. 109, ft. n. 18.)

did not take a definitive position before the Department as to the character of the land.²³

The jurisdictional predicate for Pan Am's suit was also diversity of citizenship, it alleging (R. p. 195) that it was a corporation organized under the laws of the State of Delaware, Wallis a citizen of the State of Louisiana, and, that the "matter in controversy herein exceeds, exclusive of interest and costs, the sum of Ten Thousand (\$10,000.00) Dollars."

Wallis defended by (1) denying that the option agreement covered his "public domain" lease, (2) asserting the local Statute of Frauds, and the parol evidence rule, (3) urging that Pan Am had not elected to exercise the option agreement in writing, as required by the Statute of Frauds, (4) asserting the option agreement was not binding, because (a) the consideration or "price" for a conveyance to Pan Am was "uncertain" since it could be altered at Wallis' option and (b) Wallis could elect to reserve an "oil payment" out of production, and there would, therefore, be no "consideration" since Wallis would be simply purporting to "reserve" what he had, and (5) interposing two defenses based upon the Mineral Leasing Act, and the regulations issued thereunder.²⁴

District Judge J. Skelly Wright ruled in favor of Wallis in both cases, holding the written contracts, in

²³ In light of the statement of its own attorney and expert, Mr. Stull, to the effect that he had participated in the prosecution of Wallis' "acquired lands" application, and appeal thereon, and "I do not believe it can be improved upon," Pan Am was never able to show where Wallis failed to make "diligent efforts."

²⁴ Defenses (3) through (5) were not passed upon by the district Court. Cf. footnote 24, App., *infra*, p. 111.

each instance, were restricted solely to the "acquired lands" applications and did not encompass the "public domain" lease. Moreover, Judge Wright heard **all** parol and extrinsic evidence, and held that it merely confirmed the written agreements that the parties had only intended to contract with reference to the "acquired lands" applications;²⁵ but Judge Wright ultimately rejected all parol and extrinsic evidence, under the parol evidence rule and the local Statute of Frauds. Despite the fact that the case was tried, argued and submitted by Pan Am and McKenna, based upon the applicability of local law, yet Judge Wright considered the question of the applicability of Federal law, but concluded that local law was controlling.

On appeal, and for the first time, McKenna and Pan Am asserted the applicability of Federal law, and the Court of Appeal reversed (App., *infra*, p. 122) Judge Wright, by a divided vote, and "remanded for re-trial upon the evidence already taken and any additional relevant evidence, and for full and complete findings of fact and conclusions of law on all issues under the applicable principles of federal law." Circuit Judge Wisdom filed a written dissent (App., *infra*, p. 123) agreeing with Judge Wright.²⁶ In denying petitions for rehearing, the majority handed down a further written opinion (App., *infra*,

²⁵ Said the trial Judge: "... The conclusion must be that the written agreements faithfully record what was in the minds of the parties. Accordingly, there is no pretext for a strained construction or for reformation of the instruments. These instruments, taken alone or illumined by parol evidence, limit the claims of McKenna and Pan American to the acquired lands applications." (App., *infra*, p. 109.)

²⁶ In view of the importance of the question involved concerning Federal-State relationship, it is noteworthy that, below, each disposition of the basic question won the vote of one circuit Judge and one district Judge.

p. 129) with Judge Wisdom filing a further written dissent (App., *infra*, p. 137).

The majority opinion, on rehearing, represented a decided shift in the predicate upon which its original opinion rested, if not a repudiation thereof. The original opinion was pitched, in the main, upon decisions by this Court relating to the disposal of **land** under the Public Land Laws, with particular emphasis placed upon the case of *Irvine v. Marshall*, *supra*. It made only a passing reference to two sections of the 1920 Leasing Act, coupled with the observation that the Act "makes it clear that, as part of the public policy . . . directed at opposing monopoly . . . the Bureau of Land Management must examine the qualifications of the real lessee and of any assignee of a mineral lease . . . Those provisions leave no room for operation of any State law."

On rehearing, when confronted with decisions by this Court dealing with the Public Land Laws, which destroyed the predicate for the original opinion, the majority "concluded that our decision should be more closely tied to that [1920 Leasing] Act," although it did not expressly repudiate the prior reliance upon the *Irvine* case, *supra*, and the other cited decisions.

F. REASONS FOR ALLOWANCE OF WRIT AND SUPPORTING ARGUMENT.

The more important reasons why the writ should be granted and allowed are these:

(1) The decision by the majority below is in direct conflict with the decision of the Tenth Circuit in the case of *Blackner v. McDermott*, 176 F. (2d) 498 (1949). **This**

conflict is conceded by the majority opinion,²⁷ as well as dissenting Judge Wisdom, who, in addition, maintains the decision conflicts with other decisions, including one by the Fifth Circuit.

(2) The question of Federal law decided below, is of far-reaching importance, for if it is allowed to stand, it will not only directly affect and render questionable the title of **all** outstanding Federal leases, but it will also constitute an usurpation of authority in the field of Federal-State relations (Discussed, *infra*, pp. 18-22), particularly the conclusion below, that certain provisions of the Mineral Leasing Act of 1920, "leave no room for operation of State law." (Discussed, *infra*, pp. 63, *et seq.*) This conclusion is in direct conflict with § 32 of the Act (App., *infra*, p. 96), which provides, in part, that: "Nothing in this Act shall be **construed** or **held** to affect the rights of the States . . . to exercise any rights which they may have . . ." (Discussed, *infra*, p. 22.)

(3) For the reasons given, and, authorities cited by Judge Wisdom in his dissenting opinions (App., *infra*, pp. 123, 137).

(4) It is necessary for this Court to clarify, and decide, a highly important question which results from this Court's decision in *Boesche v. Udall*, 373 U.S. 472 (1962), which decision was erroneously interpreted below, as respects the "rights" of a Federal lessee *vis-a-vis* third persons. (Discussed, *infra*, p. 59.)

²⁷ Said the majority: "It appears that the district court felt that the Rules of Decision Act compelled adherence to the local law . . . And the Tenth Circuit has followed that view in a case . . . *Blackner v. McDermott*, 10 Cir. 1949, 176 Fed. 2d 498."

(5) The decision below, as it interprets the Leasing Act, is in conflict with the interpretation thereof by the Land Department, this Court's decision in *Hodgson v. Federal Oil and Development Co.*, 1927, 274 U.S. 15 (discussed, *infra*, p. 49), as well as a prior decision of the **Fifth Circuit itself**, in *Witbeck v. Hardeman*, 1931, 51 F. (2d) 450 (discussed, *infra*, pp. 55, 71), and also the decisions of other Circuit Courts, to-wit: *Oldland v. Gray*, 1950, 10th Cir., 179 F. (2d) 408 (discussed, *infra*, pp. 56, 71), *Alaska Consolidated Oil Fields v. Rains*, 9th Cir., 1932, 54 F. (2d) 868, *Pan American Petroleum Corp. v. Pierson*, 10th Cir., 1960, 284 F. (2d) 649, *Isaacs v. De Hon*, 9th Cir., 1926, 11 F. (2d) 943, and, *Gibbons v. Pan American Petroleum Corporation*, 10th Cir., 1958, 262 F. (2d) 852 (discussed, *infra*, p. 55, *et seq.*, p. 71, *et seq.*).

(6) The decision below, contrary to the practice of the Land Department and contrary to the next above cited decisions, failed to apply applicable decisions of this Court relating to the Public Land Laws, generally, which was error, and hence such decision was contrary to decisions of this Court, among which are *Ducie v. Ford*, 1871, 138 U.S. 587; *Johnson v. Towsley*, 1871, 80 U.S. 72; *U. S. v. Buchanan*, 1913, 232 U.S. 72; and *Marquez v. Frisbie*, 1879, 101 U.S. 473 (discussed, *infra*, p. 33, *et seq.*, p. 40, *et seq.*).

I. The Questions Involved Are Important.

Aside from the immediate values involved in this suit,²⁸ and the further fact that the majority opinion below concedes that its decision is in conflict with a decision by

²⁸ The trial Court (App., *infra*, p. 101) noted these suits "involve rights in a mineral lease covering about 830 acres on the oil-rich banks of Southwest Pass, . . . of the Mississippi River . . ."

the Tenth Circuit, this case involves two highly important questions. We refer, first, to the need for clarification of this Court's decision in *Boesche v. Udall*, 373 U.S. 472 (1962), particularly in light of the interpretation placed thereon by the Court below. Second, we refer to the alarming implications of the decision below, as it relates to the important question of Federal-State relations.

In the *Boesche* case, this Court noted that as of June 30, 1960, the Secretary of Interior reported that 139,000 leases were outstanding as issued under the Mineral Leasing Act of 1920, alone, and, 159,000 leases outstanding as issued under all leasing programs.²⁹ The decision by this Court in the *Boesche* case, as that decision has been interpreted and applied by the Court below, we submit, will have far-reaching effect, and, will necessarily result in "clouding," and rendering questionable, the titles to all such outstanding leases. For the Land Department and the decisions heretofore rendered by this Court and the Circuit Courts involving the interpretation of the Mineral Leasing Act of 1920, have consistently held, as respects the "rights" of individuals acquired pursuant thereto, that: (1) such "rights" constitute "property," and are thus subject to the law of the States as respects private transactions relating thereto, so long as local law is consistent with the fact that "legal" title to the land is vested in the United States, and, the Acts of Congress relative thereto; (2) such "rights" constitute "property" in the same sense that other ineptive "rights" acquired by individuals pursuant to the

²⁹ As respects the "Mineral Leasing Act For Acquired Lands," *supra*, in the petition for certiorari filed by the Government in "*United States of America v. The Leiter Minerals, Inc.*," No. 950 on the docket of this Court, October 1964 Term, the statement is made, at page 11: "There are outstanding some 400 oil and gas leases issued by the United States [in Louisiana] covering 300,000 acres of these acquired lands."

Public Land Laws, generally, constitute "property" even though the legal title is vested in the United States; and (3) the decisions and jurisprudence relating to inceptive "rights" acquired pursuant to the Public Land Laws, generally, are equally applicable to such "rights" acquired pursuant to the 1920 Act.³⁰

Considering the foregoing, and the fact that the jurisprudence for forty years has sustained the applicability of local law as respects private dealings and transactions relating to such rights, it cannot be denied that many titles to leases heretofore acquired, will be placed in jeopardy and rendered subject to serious question, if at this late date the owners are to learn that such private dealings and transactions were (and are) governed by Federal law.

Furthermore, the decision below, if allowed to stand, (in the words of Judge Wisdom) "carries alarming implications," as respects the delicate Federal-State relationship and a proper regard for the legitimate functions of each. For the decision below (again in the words of Judge Wisdom) finds merely the "presence of a federal statute," plus a "policy" furthered by the statute, and then simply **concludes** that "uniformity" is **required** as respects the adjudication of all private transactions. At no place does

³⁰ This rule has been consistently followed by the Land Department. Cf. "Lula T. Pressey," 60 I.D. 101 (1947), at page 102: "It was well settled long prior to the passage of the Mineral Leasing Act that an entry of public land under the laws of the United States segregates it from the public domain, appropriates it to private use, and withdraws it from subsequent entry or acquisition until the prior entry is officially canceled and removed. (citing cases) * * * Shortly after the passage of the Mineral Leasing Act, the same rule was held to apply to applications filed under that act . . . This rule has been followed repeatedly by the Department, both with respect to applications for permits and for leases. (citing I. D. decisions)"

the opinion demonstrate how, or why, the adjudication of such private transactions in accordance with local law in any way relates to, or has any connection with, the "policy" of the Act, or would affect the interests of the U.S. Nor does it show or demonstrate how, or why, uniform adjudication of such private rights would relate to, or have any connection with, the "policy" of the Act, or the interests of the U.S.³¹

In the final analysis, despite the fact that this Court (we think) in *U.S. v. Standard Oil Co.*, 332 U.S. 301 (1947), attempted to clarify the question of when Federal law applies, and to establish some "guide lines" relative thereto, still confusion reigns.³² It has been treated as a "new toy" by both the lower Courts and the scholars, to say nothing of the fact (as in the cases at bar) that when all else has failed, it has become a "last straw" for the frantic lawyer. Scarcely a month goes by, that some new article is

³¹ This holding by the majority was without express consideration of, but squarely opposed to, the provision in Section 32 of the Act (App., *infra*, p. 96) which states: "... Provided, That nothing in this Act shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States."

³² 77 Harvard Law Review 1084, "The Competence Of Federal Courts To Formulate Rules of Decision," cites the very decision here involved, saying: "... *Erie* left no doubt that the lawmaking competence of the federal judiciary is limited, but the boundaries of this competence have not yet been definitively charted. An examination of the many cases in which the issue of federal competence is involved reveals a crazy-quilt pattern of conflicting determinations among the federal circuits and within panels sitting on individual cases. For example, in their present terms of court the Supreme Court divided six to three over the applicability of federal law to tax lien priorities, the Third Circuit divided over the law governing the liability for conversion of a chattel held as security for a government loan, and the Fifth Circuit split over the law governing the assignment of a lease of public domain land."

not published upon the subject, no two of which are able to reconcile the various decisions, and all ranging in opinion from rapt approbation³³ to critical condemnation,³⁴ of each new decision asserting controlling Federal law.

These cases, indeed, represent a startling new departure in the field of Federal-State relations. In the words of Judge Wisdom, ". . . if a federal court, in the name of interstitial lawmaking, may concoct a Law of Property, Law of Contracts, Law of Restitution, and, perhaps, a Law of Descent and Distribution for Mississippi Mud-Lumps, I foresee a fashioning of some fancy legal systems for a great many federal enclaves within the borders of the states." (App., *infra*, p. 141.)

II. The Comprehensiveness Of The Mineral Leasing Act, And, The Need For Uniformity—As Opposed To The Proviso Of Section 32 Of The Act Reserving The Right To The States "To Exercise Any Rights" Which They May Have.

We baldly assert that the second opinion of the majority below, holding there is a need for "uniformity" in the law applicable to these private transactions, is rendered entirely in error because of the express Congressional prohibition found in § 32 of the Leasing Act (App., *infra*, p. 96), that "**nothing** in this Act shall be **construed or held** to affect the rights of the States . . . to exercise any rights which they may have . . ." The second opinion holds that the Leasing Act "represents a comprehensive scheme of federal regulation" and that this required the

³³ Cf. "In Praise of Erie—And Of The New Federal Common Law," Volume 19, The Record Of The Association Of The Bar Of The City Of New York, page 64.

³⁴ *Supra*, footnote 32, p. 21.

conclusion that "the interest of the United States is directly affected" by the law applicable to these private agreements. Said the majority, "uniformity" in the law applicable is required and there is no room for the applicability of local law. Yet the majority opinion does not point out wherein the applicability of local law would or might conflict with any express statutory provision, or regulation issued pursuant thereto by the Secretary of the Interior. The decision is pitched solely upon the requirement of "uniformity" which, in some obscure fashion, it relates to the "policy" of the Act.

The second opinion only referred to that portion of § 32 of the Act which grants the Secretary authority to administer the Act, and, prescribe rules and regulations to accomplish the purposes of the Act. The second opinion gives absolutely no consideration to the further proviso of § 32, above noted, and, we submit, that this provision was entirely overlooked. We further submit that this provision entirely precludes the conclusion of the second opinion.

It will be noted that this proviso is drawn in the broadest terms for it precludes not only "construction" of the Act, but in addition prohibits any **provision of the Act** from denying the rights of the States "to exercise any rights which they may have." This broad grant includes the further proviso as respects the rights of the States, as "including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States." The all-encompassing language of the entire proviso has never been interpreted by this Court. However, it has had occasion

to interpret the above quoted "included" authority to tax, in the case of *Mid-Northern Company v. Walker*, 268 U.S. 45 (1924). In that case an effort was made to restrict, by interpretation, the all inclusiveness of the "included" right to tax. However, this Court rejected such effort to limit and circumscribe the proviso, saying, p. 49: "... In other words, **the purpose of Congress** was to remove **altogether** from the field of controversy, **among other questions**, the very question which is here presented, and to put beyond doubt the authority of the states to impose taxes upon lessees in respect of their property, . . ., **without regard** to the origin thereof or **to the interest of the United States in the lands or leases.**"

In connection with this extract, we wish to emphasize the fact that it interprets this proviso as respects a mineral lessee, as subordinating the "interest of the United States in the lands or leases" to the exercise of local right and authority. The opinion concludes with this statement (p. 50): "... We think the proviso **plainly discloses the intention of Congress** that persons and corporations contracting with the United States under the act, should not, for that reason, be exempt from any form of state taxation otherwise lawful." While in keeping with the questions presented, this last statement by the Court is restricted to "any form of state taxation," if we substitute for this restriction, the all-encompassing language of the whole proviso, it would read that persons and corporations holding leases under the Act "should not, for that reason, be exempt from any form of the exercise of any rights or authority of the States otherwise lawful."

What are the "rights of the States," the exercise of which, the Act shall not "be construed or held to af-

fect . . ."?³⁵ We need look no further than the second opinion when it says: "... federal law did not create the right of action . . . * * * It might be said that the absence of a congressional definition of 'option' and 'assignment'—whether they be oral or arise by operation of trust—implies that we should look to the law of the state. * * * While it might be said that [these claims] constitute transactions **essentially** of local concern and that the resulting litigation is 'purely between private parties,' . . . * * * We do not think the use of these devices as a part of the scheme of carrying forth this public policy **should be limited by interstitial restrictions imposed by the law of Louisiana . . .**"

In addition to the foregoing, the second opinion says, "the action is not one under federal law in the sense that federal law did not create the cause of action," and when this is coupled with the further statement, "federal law did not create the right of action," it necessarily acknowledges that such was created under local law. Being a State-created cause of action, is not one of the "rights of the State," the right to have that cause of action and all issues, including the remedy, governed and controlled by State

³⁵ Consider this proviso of Section 32 in light of what was said in *Davies Warehouse Co. v. Bowles*, 321 U. S. 144, 155 (1943): "It is a much more serious thing to adopt a rule of construction, as we are asked to do here, *which precludes the execution of state laws by state authority in a matter normally within state power*. The great body of law in this country which controls acquisition, transmission, and transfer of property, and defines the rights of its owners in relation . . . to private parties, is found in the statutes and decisions of the state. The custom of resorting to them to give meaning and content to federal statutes is too old and its use too diversified . . ."

law?³⁶ We need not pause to consider the incongruity of the acknowledgment in the second opinion that the right and cause of action were State-created, with its decision that the case be remanded for trial "on **all** issues under the applicable principles of federal law." *Francis v. Southern Pacific Co.*, 333 U.S. 445 (1945), which the second opinion cites and relies upon, did not pretend that Federal law governed **all** issues in the case. A mere reading of the *Francis* case discloses that in that case recovery might have been had under local law but for Federal law, and it illustrates a situation where the "rights of the State(s)" would have precluded the applicability of Federal law, had the statute there in question contained a proviso similar to that in § 32 of the Leasing Act.

We submit that the proviso of § 32 unqualifiedly precludes the "federal courts' responsibility to develop federal common law in aid of the uniform implementation and protection of federal interest" as respects the Leasing Act, and contrary to the holding of the second opinion in this respect.³⁷

Even aside from this provision of § 32 of the Act, under the decisions of this Court the holding of the second

³⁶ The State has not ceded jurisdiction over the lands in question, and when this proviso of Section 32 is considered in light of Article 1, Section 8, Clause 17 of the Constitution (*Supra*, p. 7), and, this Court's decision in *Wilson v. Cook*, 327 U. S. 474 (1945), and *Paul v. U. S.*, 371 U. S. 245 (1963), the applicability of local law to these private transactions, simply cannot be denied.

³⁷ In *U. S. v. Certain Property, etc.*, 306 F. 2d 439 (C. A., 2nd, 1962), the Court said: "Persons dealing in land within a state must conduct themselves in the light of state law, which will inevitably govern most of their relations; it would be inconvenient in the last degree if they had also to take cognizance of a Federal property law that would apply only in [a] rather rare event . . ."

majority opinion is in error. An examination of such decisions will serve to point up the enormity of the error inherent in the second opinion, all in light of this provision of § 32.

In *Radio Station WOW v. Johnson*, 326 U.S. 120, (1944), this Court held that a judgment under local law impinged upon the prerogatives of the Federal Communications Commission, by attempting to control the conduct of parties before that Commission, but said, p. 132: "On the other hand, if the State's power over fraud can be effectively respected while at the same time **reasonable opportunity** is afforded for the protection of that public interest which led to the granting of a license, the principle of fair accommodation between State and federal authority, where the powers of the two intersect, **should be observed.**" Nowhere does the second opinion demonstrate that a "reasonable opportunity is (**NOT**) afforded for the protection of (the) public interest," as respects the Leasing Act, because of the applicability by the Trial Court of "the State's power over fraud" as it is epitomized by the local Statute of Frauds.

Farmers Union v. WDAY, 360 U.S. 525 (1958), states, p. 535: "... But we have not hesitated to abrogate state law where satisfied that its enforcement would stand 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' Here, petitioner is asking us to attribute to § 315 a meaning which would either frustrate the underlying purposes for which it was enacted or alternatively impose unreasonable burdens on the parties governed by that legislation. **In the absence of clear expression by Congress we will not assume that it desired such a result . . .**" This extract calls for a "clear

expression by Congress,"³⁸ and we submit that § 32 of the Act is such a "clear expression by Congress."³⁹ We, of course, do not concede that the applicability of local law to these private transactions would either frustrate the purpose of the Leasing Act, or, impose unreasonable burdens on the parties governed thereby, and nowhere does the second opinion so demonstrate.

The majority opinion cited no authority in support of its conclusion that "uniformity" is required as respects the applicability of local law to these private transactions, but **only suggested** that its conclusion be **compared** with the decision in *Bank of America National Trust & Savings Assn. v. Parnell*, 352 U.S. 29 (1956). The holding in that case that Federal law was **not applicable** to the private transaction there involved, was summarized by this Court as follows: "... because the litigation between the two private parties there did not intrude upon the rights and the duties of the United States, the effect on the only possible

³⁸ In *Paul v. U. S.*, 371 U. S. 245 (1963), this Court said, at page 260: "If there had been a desire to make federal procurement policy bow to state price-fixing in face of the contrary policy expressed in the Regulation, we can only believe that the objectives of the Act would have been differently stated . . ."

³⁹ As to what constitutes a "clear expression by Congress," we direct the Court's attention to the recent holding by the Fifth Circuit, in an opinion *authored by the same Judge* as the two opinions below, and rendered while these cases were pending on rehearing. We refer to *The Leiter Minerals, Inc. v. U. S.*, 329 F. 2d 85 (1964), which involved a contract whereby the United States purchased land, said the Court, p. 89: "In addition, section 715f of the Migratory Act reads: 'No deed or instrument of conveyance shall be accepted by the Secretary of the Interior under sections 715-715d, 715e, 715f-715k, and 715l-715r of this title unless the State in which the area lies shall have consented by law to the acquisition by the United States of lands in that State.' (Emphasis by the Court.) We have no doubt that the Congress could make federal law applicable, but we are equally clear that it had no intention to do so when it merely authorized the contract by which the United States acquired the property. State law must govern in the absence of a federal statute making federal law applicable . . ."

interest of the United States—the floating of securities—being too speculative to justify the application of a federal rule. That doctrine clearly does not apply when the State fails to give effect to a term or condition under which a federal bond is issued, as the Court there noted . . .⁴⁰ Nowhere does the second opinion point out wherein the applicability of local law to these private transactions has failed to “give effect to a term or condition” under which this federal lease was granted, nor to give effect to any provision of the Leasing Act or any regulation issued thereunder. For in the final analysis, local law as here applied, was entirely negative, in that it simply said that as a result of this private transaction, the status of this federal lease **was in no way altered**. The majority opinion did not pretend that local law as here applied, would affect the “floating” of Federal leases.

The decisions last above reviewed demonstrate the error of the holding of the majority below, aside from the express prohibition contained in § 32 of the Leasing Act.⁴¹ We submit that this proviso of § 32 of the Act so clearly demonstrates the error of the majority below, that this Court would be justified in granting this petition, and, **immediately reversing the decision below without further proceedings**. In any event, we submit that § 32 of the Act, and, the decisions above referred to are such that a review is required in keeping with what was said in *San Diego Unions v. Garmon*, 359 U. S. 236 (1959), at page 241: “In

⁴⁰ *Free v. Bland*, 369 U. S. 663, 669 (1961).

⁴¹ Added evidence of Congressional solicitude and regard for the full sway of local law is found in Section 30 of the Act, where Congress detailed certain matters which should be covered by provisions to be inserted in Federal leases, and then concluded with the provision: “That none of such provisions shall be in conflict with the laws of the State in which the leased property is situated.” App., *infra*, pp. 93, 94.

determining the extent to which state regulation must yield to subordinating federal authority, we have been concerned with delimiting areas of potential conflict; potential conflict of rules of law, of remedy, and of administration . . .” This has never been done by this Court, as respects the Leasing Act, and the majority opinion below, in disregard of, and contrary to, all past decisions of this Court and those of the Circuit Courts, including the Fifth Circuit, makes absolutely no effort to discriminate between “conflicting rules of law, of remedy, and of administration.” No effort is made at “delimiting areas of potential conflict,” or consideration given to matters of “a merely peripheral concern.” On the contrary, in one fell swoop, it wipes the slate clean of any area for the exercise of local law, by requiring the application of Federal law to all issues.

As we view the opinions below, the Court’s acknowledgment that the right and cause of action here involved are locally created, thereby removes these cases from the “full sweep” of the doctrine of *Textile Workers v. Lincoln Mills*, 353 U. S. 448 (1956). Yet without so stating, it attempts to take advantage thereof, by speaking of the comprehensiveness of the Leasing Act. But this disregards several important factors. The Leasing Act, to the point of granting leases on Federal lands, is no different and no more “comprehensive” than any of the other general Public Land Laws. The only real difference results simply from the nature of the “right” granted, and more particularly the situation contemplated **after the “right”** in the Fed-

eral land **is granted**. This results from the fact that a lease is a continuing executory contract, which continuously generates rights in favor of the lessor, the United States. Thus when this Court noted, in the *Boesche* case, that the Leasing Act "has also subjected the lease to exacting restrictions and continuing supervision by the Secretary," it was speaking in the main **of the supervision of the lessor's rights under the lease, and, of the operations conducted under the lease in accordance with the terms of the lease, all as distinguished from the ownership of the lease itself.** On this aspect of the matter, the ownership of the lease, there is nothing "restrictive," for while an "assignment" or "sublease" must be approved by the Secretary, yet he has no discernible discretion, since under § 30 (a) (App., *infra*, p. 94), he may "disapprove" **for only two specific reasons.** This, we submit, should be contrasted with what was said in the *San Diego Unions* case, *supra*, concerning the labor laws, and more particularly the administration thereof by a "centralized administrative agency."⁴²

The Public Land Laws, generally, have always provided for administration thereof, by the Secretary of the

⁴² Even in the field of labor law, in *Hamilton Foundry & M. Co., v. International M. & F. Wks.*, 193 F. 2d 209 (C. C. A., 6th, 1951), certiorari denied 343 U. S. 966, a local Statute of Frauds was applied to a collective bargaining agreement, the Court saying, page 215: "Although the contract and federal jurisdiction to enforce it arise out of a federal statute, the enforcement of the right must conform to the remedy prescribed by the law of the state where the action is brought. We agree with appellant that a state statute can not change or diminish a substantive right created by a federal statute. . . ., but a state statute is applicable where it deals with the remedy rather than with the substantive right . . ." This decision was cited with approval in *Lincoln Mills*, but the decision in *Lincoln Mills* leaves it unclear as to whether or not this remedy would be "a merely peripheral concern of the Labor Management Relations Act," as referred to in the *San Diego Unions* case.

Interior. No special "administrative agency" is created by the Leasing Act. Yet all of the other Public Land Laws are similarly administered by the Secretary and the "policy" of Congress has been to leave to local law and local tribunals, the adjudication of "**private transactions**" had by those holding inceptive "rights" under such laws.

III. The Original Opinion Of The Majority Below And The *Boesche* Case, In Light Of Decisions Concerning The Public Land Laws, Generally, And The Decisions Interpreting The Mineral Leasing Act.

Without mention of the *Boesche* case, the original opinion (App., *infra*, p. 114) of the majority relied entirely upon decisions relating to the Public Land Laws, generally, with only a passing reference to the Leasing Act and its "policy" against "monopoly." **Not one single case was cited** which dealt with the Leasing Act. In its second opinion (App., *infra*, p. 129), it did not explicitly repudiate the predicate for its original opinion, although we submit it did so by inference, for it acknowledged that: "We have concluded that our decision should be more closely tied to that [Leasing] Act." It is apparent that the second decision utilized the *Boesche* case as a vehicle for avoiding the force and effect of decisions relating to the Public Land Laws, generally, and which demonstrated the inapplicability of those decisions originally relied upon. It is, therefore, necessary to consider the original opinion, and particularly the decisions relating generally to the Public Land Laws. This consideration serves as a predicate for an examination of the second opinion and the decisions interpreting the Leasing Act. Also it will place the *Boesche* case in proper focus.

A. The Decisions Relating To The Public Land Laws As Respects The Nature Of Inceptive Rights While The Legal Title Remains In The United States.

The decisions and jurisprudence relative to the disposition of lands pursuant to the Public Land Laws, have developed within the framework of the following propositions: (1) "... The power of Congress to dispose of any kind of property belonging to the United States 'is vested in Congress without limitation' . . . The power over the public land thus entrusted to Congress is without limitations. 'And it is not for the courts to say how that trust shall be administered. That is for Congress to determine.' " *Alabama v. Texas*, 347 U.S. 272, 273 (1953);⁴³ (2) Congress has delegated authority over the administration and disposition of the public domain, to the Secretary of the Interior and the Land Department. *Best v. Humboldt Mining Co.*, 371 U.S. 334 (1962);⁴⁴ and (3) As respects such public domain, "... the power of Congress is exclusive and that only through its exercise in some form can rights in lands belonging to the United States be acquired. True, for many purposes a State has civil and criminal jurisdiction over lands within its limits belonging to the United States, but this jurisdiction does not extend to any matter that is not consistent with full power in the United States to protect its lands, to control their use and to prescribe in what manner others may acquire rights in them . . ." *Utah Power & Light Co. v. U.S.*, 243 U.S. 389, 404 (1916).

⁴³ Cf. *Standard Oil Co. of California v. U. S.*, 107 F. 2d 402, 409 (C. C. A., 9th, 1939), *certiorari denied* 309 U. S. 654, 309 U. S. 673: "... The disposal of the public lands is not a subject over which the 'judicial power' of the United States is extended . . ."

⁴⁴ Cf. page 339: "... Congress has entrusted the Department of the Interior with the management of the public domain and prescribed the process by which claims against the public domain may be perfected . . ."

As respects the first two propositions above noted, we digress in order to pose these propositions, to-wit: Where is there any "duty" imposed upon the "federal courts" to see that "the equitable title as well as the legal title to public lands"⁴⁵ is properly vested? And, assuming the Leasing Act contemplates someone will "fill the interstices," where has Congress delegated authority so that "federal courts must fill the interstices"?⁴⁶ As respects both questions posed, are not these matters delegated by Congress **solely and exclusively** to the Secretary of the Interior?⁴⁷ As respects the third proposition, considering the Secretary has granted Wallis the lease, wherein is local law "not consistent with the full power of the United States," when such local law merely says that by these private transactions in light of the local Statute of Frauds, McKenna and Pan Am **have not** acquired an interest in Wallis' lease? More particularly, how does such application of local law affect or frustrate the "policy" **against** "monopolies"?

In considering the cases relating to the Public Land Laws, it should be remembered that the "policy" against

⁴⁵ First opinion of the majority, App., *infra*, p. 116.

⁴⁶ Second opinion of the majority, App., *infra*, p. 133.

⁴⁷ Title to the land still being vested in the United States, are not such matters within the sole jurisdiction of the Secretary under Section 32 of the Act (30 U. S. C. A. 189), for he "is authorized to prescribe . . . regulations . . . and to do any and *all things necessary* to carry out and accomplish the purposes of" the Act? One premise for the decision in the *Boesche* case, was the fact that title to the land, in the case of a lease, remained in the United States, yet this Court limited the effect of the decision with this circumscribing *caveat*: "We sanction no broader rule than is called for by the exigencies of the general situation *and the circumstances of this particular case*. We hold only that the Secretary has the power to correct administrative errors of the sort involved here by cancellation of leases in proceedings timely instituted by competing applicants for the same land." 373 U. S. 472, 485.

"monopoly" is not unique or peculiar only to the Leasing Act. For we do not know of a single Public Land Law (disposing of rights generally to the public) wherein this same "policy" does not inhere, for all such Acts that we have found have acreage limitations as respects permissible holdings.⁴⁸ Yet the decisions relating to such Public Land Laws, generally, hold that local law is applicable to private transactions and dealings affecting inceptive rights in "public lands," where the "legal title" is still vested in the United States. And this without any suggestion or intimation that it conflicts with the statutory "policy" against "monopolies." Furthermore, where statutory "policy" was being frustrated by private contracts relating to such inceptive rights, this Court had noted that it was Congress that has corrected the situation, rather than saying that the "policy" of the statute conferred interstitial authority upon the Courts to do so.⁴⁹

In considering the incipient "rights" of a homesteader, *U. S. v. Buchanan*, 232 U.S. 72 (1913), held that

⁴⁸ Cf. *U. S. v. Trinidad Coal & Coking Co.*, 137 U. S. 160, 166 (1890), Rev. Stat. sec. 2347, 30 U. S. C. 71, as to coal. In the homestead laws (Rev. Stat. sec. 2289; 26 Stat. 1097; 43 U. S. C. sec. 161), the timber and stone laws (20 Stat. 89; 27 Stat. 348; 43 U. S. C. sec. 311), the desert-land laws (19 Stat. 377; 26 Stat. 1096; 43 U. S. C. sec. 321), the laws pertaining to underground water reclamation grants (41 Stat. 293; 43 U. S. C. sec. 351), the Taylor Grazing Act, as it relates to homesteads (48 Stat. 1272; 43 U. S. C. sec. 315f), and the mining laws (Rev. Stat. secs. 2320, 2329, 2331; 30 U. S. C. secs. 23, 35).

⁴⁹ In *Myers v. Croft*, 80 U. S. 291 (1871), at page 295: "This was felt to be a serious evil, and Congress, in the law under consideration, undertook to remedy it by requiring of the applicant for a pre-emption, before he was allowed to enter the land on which he had settled, to swear that he had not contracted it away, nor settled upon it to sell it on speculation . . ."

the entryman acquired the right to "treat the land as his own" though "legal title" remained in the United States, and this "right was in the nature of private property," saying, at page 77: ". . . The entry by Moore withdrew the land from entry or settlement by any other, and segregated the quarter-section from the public domain. **The legal title remained in the Government** until patent issued, but **as against all except the United States** he was the lawful possessor clothed with an inceptive title . . . * * * This view is sustained by the terms of the statute and is in accord with the policy to leave the protection of such possessory claims to the laws of the several States. Congress could have legislated so as to make the statute applicable until patent issued. But instead of doing so, it left the homesteader, who had acquired a possessory title, to avail himself of the same rights that were open to others holding lands, by title absolute or inchoate . . ."

In *Gauthier v. Morrison*, 232 U.S. 452 (1913), suit was instituted by a homesteader in a State court, seeking protection of his inceptive "right" to possession, and the State court dismissed for want of jurisdiction, since it appeared that the claim depended upon a matter assumed to be within the jurisdiction of the Land Department. In reversing, this Court held that, ". . . no interference with that [Land] department or usurpation of its functions was here sought or involved. * * * Congress has not prescribed the . . . mode in which such wrongs may be restrained and redressed . . . but has pursued the policy of permitting them to be dealt with in local tribunals accord-

ing to **local modes of procedure.**"⁵⁰ In support thereof, the cases of *Lytle v. Arkansas*, 63 U.S. (22 How.) 193 (1859), and *Black v. Jackson*, 177 U.S. 349 (1899), are cited, among others. In the *Lytle* case, this statement appears, page 205: "This slab tenement was built by Moses Austin, about 1820. On leaving Little Rock, **he sold** it to Doctor Mathew Cunningham; it passed through several hands, till it was finally **owned by** Col. Ashley. Buildings and cultivated portions of the public lands were **protected by the local laws** of the Arkansas Territory; either ejectment or trespass could have been maintained by Ashley against Cloyes to recover the premises, nor could an objection be raised by any one, **except the United States**, to these transfers of possession—neither could Cloyes be heard to disavow **his landlord's title**. He held possession for Ashley, and was subject to be turned out on a month's notice to quit." In the *Black* case, the local court had issued a mandatory injunction requiring an adverse possessor to remove certain improvements from a homestead claim, and, in reversing, this Court said, page 359: "What circumstances under the **laws of Oklahoma** will justify the use of a mandatory injunction for the purpose of ousting a

⁵⁰ The Court said, page 461: "Generally speaking, it also is true that it is not a province of the courts to interfere with the Land Department in the administration of the public-land laws, and that they are to be deemed in process of administration until the proceedings for the acquisition of the title terminate in the issuing of a patent. *But no interference with that department or usurpation of its functions was here sought or involved.* It has not been invested with authority to redress or restrain trespasses upon possessory rights or to restore the possession to lawful claimants when wrongfully dispossessed. *Congress has not prescribed the forum and mode in which such wrongs may be restrained and redressed*, as doubtless it could, but has pursued the policy of permitting them to be dealt with in the local tribunals according to local modes of procedure. And the exercise of this jurisdiction has been not only sanctioned by the appellate courts in many of the public-land States, but also recognized and approved by this court . . ."

person of the possession of land and putting his adversary in possession—neither party having the legal title—is left in some doubt **by the decisions of the Supreme Court of that Territory . . .**” The Court then proceeded to note the extensive local laws dealing with possessory rights, and decided the case based on local decisions.

It is obvious from the foregoing decisions, that in the determination by State courts of private “rights” to possession of property, the legal title to which was in the United States, it was necessary for local law to be applied in resolving disputes which flowed from private transactions, such as deeds, leases, agreements to sell, and other similar types of contracts. This is made manifest from the case of *Marquez v. Frisbie*, 101 U.S. 473 (1879), when this Court said, page 475: “We did not deny the rights of the courts to deal with the possession of the land **prior to the issue of the patent, or to enforce contracts between the parties concerning the land . . .**” These cases illustrate the fact that as respects such incipient “rights,” and even prior to the issuance of “legal title,” the Courts apply local law to the private contracts concerning such rights.

Similarly, as respects the incipient “right” of a mining claim,⁵¹ and in sustaining a local tax and resulting lien thereon, *Forbes v. Gracey*, 94 U.S. 762 (1876), states page 767: “. . . Those claims are the subject of bargain and sale, . . . They are property in the fullest sense of the

⁵¹ In *Cameron v. U. S.*, 252 U.S. 450 (1919), at page 460: “A mining location which has not gone to patent is of no higher quality . . . than are unpatented claims under the homestead and kindred laws. *If valid, it gives to the claimant certain exclusive possessory rights, and so do homestead and desert claims . . .*”

word, and their ownership, transfer, and use are governed by a well-defined code or codes of law, and are recognized by the States and the Federal government. **This claim may be sold, transferred, mortgaged, and inherited, without infringing the title of the United States.** Why may it not also be made subject to a lien for taxes, and the claim, such as it is, recognized by statute, **be sold to enforce the lien? We see nothing in principle or in any interest which the United States has in the land to prevent it.**" While recognizing that such incipient mining claim was "property" and thus subject to local tax law and lien, as well as vesting "the right to sell, transfer, mortgage and inherit," yet *Black v. Elkhorn Mining Co.*, 163 U.S. 445 (1896), held that local law could not impose a right of dower thereon, saying: ". . . We do not think that under the Federal statute the locator takes such an estate in the claim that dower attaches to it. * * * By the terms of the statute there is no grant of any right to the wife. It is granted to the locator and to his heirs and assigns, and there is no condition that hampers the right to convey by encumbering it with an inchoate right of dower . . ." ⁵²

And *Ducie v. Ford*, 138 U.S. 587 (1890), affirmed the application of the local Statute of Frauds to the assertion of a "trust" on property held under a mining patent, which asserted "trust" was predicated upon an oral agreement made with the patentee prior to issuance of the patent

⁵² Similarly, *McCune v. Essig*, 199 U. S. 382 (1905), held that the incipient "right" of a homesteader, who died prior to the issuance of a patent, would not vest in his widow in accordance with local community property law, but such right would devolve in accordance with the Act of Congress. However, *Buscher v. Buscher*, 231 U. S. 157 (1913), held that upon issuance of a patent to a homesteader, the title so vested in the patentee as community property under local law.

by the United States.⁵³ **Ducie cannot be distinguished from the cases at bar.**

The foregoing cases dealing with the "rights" acquired by private individuals in "public lands," disclose that such "rights" are "property," even though the "legal title" to such lands are still vested in the United States. They further demonstrate that local law governs private contracts and transactions relating to such inceptive "rights" and thus may operate **indirectly** or incidentally on such "rights" by governing such transactions, all so long as local law is: (1) consistent with the "legal title" being vested in the United States, (2) is not contrary to, or in conflict with, an Act of Congress, and (3) does not purport to operate **directly** upon the legal title to the land or attempt **directly** to regulate or vest legal title to the land. **But most important**, they clearly show that such operation of local law, does not **frustrate, interfere with or affect**, the "policy" of the various statutes as opposed to "monopolies."

B. Decisions Relating To The Public Land Laws As Respects The Equitable Power Of The Courts And The Application Of Federal Law.

The decisions by this Court disclose that the equitable powers of Federal Courts, whereby they apply Federal law, only extend to **reviewing** matters which transpired before, or were initiated before, the Land Department. And in exercising this power, it could only recognize "equit-

⁵³ In *Williams v. U. S.*, 138 U. S. 514 (1890), *decided on the same day* as the *Ducie* case, this Court said, at page 522: "This brings us to the final contention: . . . and that the government pays no attention to private disputes between parties who have transactions in respect to public lands before it parts with its title, . . . * * * In the main, we do not doubt these propositions of law; . . ." We will consider this case in more detail hereafter.

able rights" which had originated with, or had been presented to, and been denied by, the Land Department.

The leading case on this subject, is *Johnson v. Towsley*, 80 U.S. 72 (1871), where the Court said, at page 85: "... if for any other reason recognized by courts of equity, as a ground of interference in such cases, the legal title has passed from the United States to one party, when, in equity and good conscience, **and by the laws which Congress has made on the subject**, it ought to go to another, 'a court of equity will,' . . . , 'convert him into a trustee of the true owner, and compel him to convey the legal title.' . . ."⁵⁴ We cannot emphasize too strongly, the statement from this extract, that the equitable power will operate "when, in equity and good conscience, **AND by the laws which Congress has made on the subject**, it ought to go to another . . ."⁵⁵ Thus it is not alone sufficient, that a party

⁵⁴ The Court said, page 85: "... So also the register and receiver, . . . , often hear the application of a party to enter land as a pre-emptor or otherwise, decide in favor of his right, receive his money, and give him a certificate that he is entitled to a patent. Undoubtedly this constitutes a vested right, and it can only be divested according to law. In every such case, where the land office afterwards sets aside this certificate, and grants the land thus sold to another person, it is of the very essence of judicial authority to inquire whether this has been done in violation of law, and, if it has, to give appropriate remedy. And so, if for any other reason recognized by courts of equity, as a ground of interference in such cases, the legal title has passed from the United States to one party, when, in equity and good conscience, *and by the laws which Congress has made on the subject*, it ought to go to another, "a court of equity will,' . . . , 'convert him into a trustee of the true owner, and compel him to convey the legal title.' . . ."

⁵⁵ This rule was summarized in *Reclor v. Gibbon*, 111 U. S. 276, at page 290, as follows: "... the jurisdiction of courts of equity might be invoked to ascertain if the patentees did not hold in trust for other parties; and if it appeared that the party claiming the equity *had established his right to the land upon a true construction of the acts of Congress*, and by an *erroneous construction* the patent had been issued to another, the court would correct the mistake . . ."

may be **seeking** an equitable remedy, but he **must also show** that "by the laws which Congress has made" the property "ought" to go to him. Here McKenna and Pan Am cannot show that by any law of Congress, the lease ought to have been awarded to them by the B. L. M. rather than to Wallis. McKenna and Pan Am took absolutely no steps to obtain the lease from the B. L. M. in accordance with the Act of Congress, but they claim only through private contracts made with Wallis,⁵⁶ **who was the only one who** sought and obtained the lease "by the laws which Congress has made on the subject."

The foregoing principle of *Johnson v. Towsley*, was elaborated upon more fully in the case of *Marquez v. Frisbie*, from which we quoted (*supra*, p. 38). In the *Marquez* case, the Court pointed out the circumstances under which an action at law will lie, and also when a court of equity has jurisdiction, holding the patent was conclusive in courts of law, as respects matters which transpired before the Land Department prior to issuance of the patent. But as respects a court of equity, the Court said, page 476: **" . . . But that in this class of cases, as in all others, there exists in the courts of equity the jurisdiction to correct mistakes, to relieve against frauds and impositions, and in**

⁵⁶ In *Oldland v. Gray*, 179 F. 2d 408 (C. C. A., 10th), *certiorari denied* 339 U. S. 948, where the plaintiff sought to impose an "equitable trust" on a Federal oil and gas lease, the Court said, at page 412: *" . . . Federal law did not create this asserted cause of action, nor is it an essential element thereof in the sense that the cause of action will be sustained if federal law is given one construction or effect, and defeated if given another. The asserted rights of the parties arise out of a private contract, and they must stand or fall upon its construction or effect . . . "* In *Manuel v. Wulff*, 152 U. S. 505, 511 (1894), in speaking of the inapplicability of the Federal mining statute, to a conveyance of a mining location, this Court said: *" . . . his claim passed to his grantee, not by operation of law, but by virtue of his conveyance . . . "*

cases where it is clear that these officers [of the Land Department] have by a mistake of the law, given to one man the land which, on the undisputed facts, belonged to another, to give appropriate relief.' *Moore v. Robbins*, 96 U.S. 530, 535; *Shepley v. Cowan*, *supra*; *Johnson v. Towsley*, *supra*." ⁵⁷

In accordance with the foregoing is *St. Louis Smelting and Refining Company v. Kemp*, 104 U.S. 636, holding that equity could not afford relief, if the plaintiff could not "connect himself with the original source of title . . . (and) aver that his rights are injuriously affected by the existence of the patent."⁵⁸ On the other hand, the case of *Marquez v. Frisbie*, *supra*, while acknowledging that Courts

⁵⁷ The derivative of the Court's power and authority to judicially review matters which transpire before the Secretary, as respects his disposition of the "legal title," is as stated in *Standard Oil Co. of California v. U. S.*, *supra*, at page 410: ". . . If Congress has clothed the Secretary with general authority to administer the grant, and if his decision of fact in this instance was made within the scope of such authority, there can be no doubt that his decision is conclusive on the courts, in the absence, at any rate, of fraud or imposition . . . Of course, in order to give conclusive effect to his decision, the Secretary's power in the premises must be exercised within the limits of due process, . . ."

⁵⁸ Cf. page 647: ". . . The judgment of the department upon their sufficiency was not, as already stated, open to contestation. If in issuing a patent its officers took mistaken views of the law, or drew erroneous conclusions from the evidence, or acted from imperfect views of their duty, or even from corrupt motives, a court of law can afford no remedy to a party alleging that he is thereby aggrieved. He must resort to a court of equity for relief, and even there his complaint cannot be heard unless he connect himself with the original source of title, so as to be able to aver that his rights are injuriously affected by the existence of the patent; and he must possess such equities as will control the legal title in the patentee's hands. *Boggs v. Merced Mining Co.*, 14 Cal. 279, 363. It does not lie in the mouth of a stranger to the title to complain of the act of the government with respect to it. If the government is dissatisfied, it can, on its own account, authorize proceedings to vacate the patent or limit its operation." See also: *Steel v. St. Louis Smelting and Refining Company*, 106 U. S. 447, 454, and *Bohall v. Dilla*, 114 U. S. 47 (1884).

could "deal with the possession of land" prior to patent, and "enforce contracts between the parties concerning the land," yet it had this to say, page 475. "And we think it would be quite as objectionable to permit a State Court, while such a question was under the consideration and within the control of the executive department, to take jurisdiction of the case by reason of their control of the parties concerned, and render decree in advance of the action of the government, **which would render its patents a nullity when issued.**" Since a State Court could not do this, necessarily a State Legislature could not by law, attempt to operate **directly** upon the title to the land, prior to patent, and "render (the) patents a nullity when issued." This was the purport of the Statute involved in the case of *Irvine v. Marshall*, 61 U.S. (20 How.) 558, and it is only to this extent that *Irvine* is competent authority, and the foregoing decisions disclose the error of the first opinion in applying it to the facts here involved, and, in accepting it as controlling.⁵⁹

It was the rule announced in the foregoing cases (and some discussed hereafter) which required the majority of the Court below to retreat from (if not abandon) the predicate for the original opinion. This it did in an

⁵⁹ Additional reasons why the *Irvine* case is not controlling here, are: (1) the Statute involved was not a Statute of Frauds, for the case was before the Supreme Court on a demurrer, and the decision upon remand (Cf. *Irvine v. Marshall and Barton*, 7 Minn. 286, 1862) discloses there was a written contract involved; (2) the "legal title" to the land was still vested in the United States, whereas here the "title" to the lease has been given by the Land Department to Wallis; (3) *both parties* in the *Irvine* case were asserting inceptive "rights" to the land involved; and (4) the "legal title" to the land being in the United States and thus the matter being within the jurisdiction of the Land Department, the foregoing cases disclose that the Federal court had no more authority to decide "title," or, purport to vest "title," by imposing an "equitable trust," than did the State court.

obscure fashion in the second opinion, when (App., *infra*, p. 131) it said: "It should be noted that the actions before the district court, and before this Court on appeal, **do not seek to overturn the decision of the Secretary awarding the lease to Wallis. McKenna and Pan American were not applicants who competed with Wallis** before the Secretary. Indeed, it is evident that McKenna and Pan American supported Wallis's claim to the Secretary that he was the first qualified applicant for the acreage in question and entitled to a lease. If these actions were those of 'competing claimants,' the Secretary's decision **would be subject to judicial review** only if it were shown that he had acted arbitrarily or unreasonably or that his interpretation of what constitutes 'public lands' was erroneous as a matter of law. E. g., *Morgan v. Udall*, D.C. Cir. 1962, 306 F. (2d) 799."⁶⁰

The foregoing discloses the extent to which a Federal court could apply Federal law, under the Public Land Laws generally, as respects "equities" asserted by a third person, where such "equities" originated **prior** to the severance of the "legal title" from the United States. These cases disclose that it is only where such "equities" originate in proceedings before the Land Department—where the parties are "competing claimants," that the Federal Courts might

⁶⁰ In light of the foregoing decisions *by this Court*, which were cited to the Court below, it is ironical that the majority opinion chose to cite *Morgan v. Udall* in support of this statement. Wallis was a party to that suit, along with the Secretary of the Interior, and the suit by Morgan sought judicial review of the Secretary's *award to Wallis of the very Federal lease here involved*. The decisions above cited disclose that Morgan's suit is the *only instance* where a Federal court of equity might have jurisdiction to apply Federal law, and, impose an "equitable trust" on the "title" to a Federal lease after issuance by the Secretary. For Morgan's claim *originated with the Land Department* and he had initially sought the lease (adversely to Wallis) *from and before the Land Department*. Morgan *was not* (as are McKenna and Pan Am) claiming the lease *by and through Wallis*, as are McKenna and Pan Am.

adjudicate under Federal law. On the other hand, if such "equities" do not so originate, but only originate prior to issuance of "legal title" and from a private contract or dealing with the **only one** having inceptive "rights," then the "equities" are governed by "local law," in that local law governs his rights and remedies as respects such private transactions.⁶¹

That such jurisdiction of a Federal court to apply Federal law **does not extend** to private transactions and contracts had with one **who is the only party** dealing with the Land Department, is clearly demonstrated in the case of *Williams v. U.S.*, *supra*. There Williams made a "desert-land" entry, and then purported to "sell" eighty acres thereof by warranty deed for \$5,000.00, and the "purchasers" spent approximately \$60,000.00 in erecting a quartz mill thereon. It was apparent that Williams then devised a scheme to defraud the "mill owners" and he did not do the required reclamation work, but relinquished and cancelled his "desert-land" entry. At the same time he set about obtaining title thereto through the State, since the State was entitled to select the lands under an appropriate Act of Congress. The "legal title" was granted the State, and Williams then acquired from the State. The Court set aside the transfer by the Secretary to the State because of "inadvertence and mistake," occurring in the Land Department, which had resulted in the Secretary's approving the State's selection list. This "mistake" **did not**

⁶¹ We submit the same law is applicable to the cases at bar, for the asserted rights of both McKenna and Pan Am originate from private contracts with Wallis, entered into prior to the issuance of the lease to Wallis. They did not claim "adverse" to him before the B. L. M., but now claim through and under Wallis, and as the Trial Court held, such contracts *did not even deal* with the application for the lease which ultimately issued.

relate to Williams' private transaction with the "mill owners," but the Court recognized the overwhelming "equities" in favor of the "mill owners," resulting from their private contract with Williams, and his conduct⁶² in attempting to defraud them. In answer to Williams' argument, that the "legal title" had properly vested in the State in accordance with the Act of Congress and that the "government pays no attention to private parties who have transactions in respect to public lands before it parts with its title," the Court said: "In the main, we do not doubt these propositions of law." However, the Court noted that had the "equities" in favor of the "mill owners" been called to the attention of the Secretary, since the law required his approval of the selection list, he would have been justified in declining to certify the list, saying at page 524:

" . . . It (the statute) gives the power to the Secretary to deny this application of the State, and refuse to approve its selection, and hold the title in the general government until, within the limits of existing law or by special Act of Congress, a party who, misinformed and misunderstanding its rights, has placed such large improvements on the property, shall be enabled to obtain title from the government."

In connection with this holding, these propositions should be noted: (1) The Court held that the Secretary had the "power" (not the "duty") to consider the "equities" aris-

⁶² We remind the Court, that there is no finding of fact, in the case at bar, that Wallis attempted by scheme or artifice to defraud the plaintiffs under the contracts here involved, but assuming, arguendo, that such was the case, local law provides an adequate remedy, as noted by both Judge Wright and Judge Wisdom, each of whom was trained in the Civil Law which prevails locally.

ing from this private transaction; (2) it did not suggest that the equity power of the Court was such, **that under Federal law**, the private contract with Williams would permit the imposition of an "equitable trust" upon the "legal title" held by Williams;⁶³ and (3) on the contrary, it held that the Land Department might hold the "legal title" in the "government until, within the limits of existing law or by special Act of Congress," the "mill owners" would be able "to obtain title from the government." But more important still, is the holding that under the Act of Congress the Secretary had been granted the "power" to take cognizance of the "equities" arising from this private contract and transaction. For such grant of "power" by Congress to the Secretary, completely negatives and precludes any authority or jurisdiction in the Federal courts over such "equities," whether as a court of equity, or, interstitially under Federal law.

These cases, we submit, demonstrate conclusively, that Federal courts have no jurisdiction to apply Federal law to such private transactions. The Secretary has the "power" to consider such "equities", but where he has not done so, or does not choose to, the parties are relegated to local law. As heretofore noted⁶⁴ as respects inceptive rights, the "policy (is) to leave the protection of such possessory claims to the laws of the several States, . . . , it (the statute) left the homesteader . . . , to avail himself of the same rights that were open to **others holding lands, by title absolute or inchoate . . .**" As we shall show hereafter, the Secretary has done just that.

⁶³ As heretofore noted, this decision was handed down *on the same date*, as *Ducie v. Ford*. Cf. *supra*, p. 39, for comment and comparison.

⁶⁴ Cf. *U. S. v. Buchanan*, *supra*, p. 35.

C. Decisions Relating To And Interpreting The Mineral Leasing Act, Are Contrary To The Decision Below.

As heretofore noted, the Land Department, in administering the Mineral Leasing Act, has applied and followed the cases and decisions relating to the Public Land Laws, generally,⁶⁵ as respects inceptive "rights" acquired under the Act. Furthermore, the Land Department has expressed the opinion⁶⁶ that Federal oil and gas leases "vested the lessees with a property right and estate for years in real property," that this rule so adopted "was said to be 'consistent with the purpose and intent of the leasing law' * * * , a holder of a . . . lease has an immediate leasehold interest in all of the land subject to the lease . . ." The decisions of the Courts in interpreting and applying the Leasing Act, are entirely consistent with this position of the Land Department.

One of the first decisions construing the Act, was the case of *Hodgson v. Federal Oil & Development Co.*, 274 U.S. 15 (1927). In the Court below, Wallis asserted that this decision was controlling in his favor. However, the second opinion of the majority held (App., *infra*, footnote 7, p. 137) that: "We read *Hodgson* as fashioning a federal law of fiduciary relationship by drawing on the law of several states." We submit this holding is in error, and that the case does, in fact, support the position of Wallis. Before considering the position of the majority, and the

⁶⁵ *Supra*, footnote 30, p. 20.

⁶⁶ Opinion by the Solicitor of the Department of the Interior to the Assistant Secretary of Interior, dated January 12, 1945, 59 I. D. 4.

Hodgson case, these matters should be borne in mind, to wit: (1) *Hodgson* was a suit in equity, (2) it was decided in the "pre-Erie-pre-Guaranty Trust Co. v. York era," and (3) **the rule of *Johnson v. Towsley***, that courts of equity would impose a "trust" on the "legal title," when "in equity and good conscience **AND** by the laws which Congress has made on the subject, it (the "legal title") ought to go to another . . ."

The *Hodgson* case arose in Wyoming and Hodgson was attempting to impose an "equitable trust" upon a lease issued to the oil company pursuant to § 18 (App., *infra*, pp. 80-81) of the Leasing Act. Of importance is the fact that § 18 was **a special "relief" provision** of the Act, designed to fit a particular situation, and, afford relief to those whom Congress considered had suffered a hardship as a result of the "withdrawal order" of the President issued September 27, 1909.⁶⁷ Sec. 18 provided that those who were in possession prior to July 3, 1910 under claims (pursuant to the pre-existing placer mining law) to any oil and gas bearing land incorporated in the "withdrawal order," and if still in possession (undisputed prior to July 1, 1919), they would, upon surrender of their rights (under certain conditions and within a delay), be entitled to the issuance of a lease. Of particular importance as respects these cases, is the fact that § 18 **specifically provided** that "all leases hereunder shall inure to the benefit of the claimant and all persons claiming through or under him by lease, con-

⁶⁷ In the *Boesche* case, *supra*, the Court said, page 480: "Public lands valuable for their oil deposits had been opened to entry as placer mining claims by the Act of February 11, 1897, 29 Stat. 526. In 1909, confronted with a rapid depletion of petroleum reserves under this system, the President issued a proclamation withdrawing from further entry pending the enactment of conservation legislation upwards of 3,000,000 acres of land in California and Wyoming . . ."

tract, or otherwise, as their interest may appear.”⁶⁸ Hodgson was claiming that he owned an undivided interest in the placer mining claim, which the oil company had surrendered and in return for which it received the lease issued under § 18 of the Act. Hodgson asserted two predicates for his recovery, to-wit: first, he asserted that he came within the above quoted provision of the Act, and, second, he asserted his grantors were co-owners of the placer claim with the oil company, and that, being co-owners, a resulting fiduciary relationship was established between them, and such relationship forbade a co-owner from acquiring and asserting an adverse title. The Court found that the co-tenancy accrued at different times and by different instruments purporting to convey the full title to the claim.

As respects the assertion that Hodgson was entitled to recover under the Act, after pointing out that he had

⁶⁸ We ask the Court to give particular consideration to this quoted provision. It *does not apply* to leases issued *generally* under the Act, but it *only applies* to leases issued under this *special and restricted section*. It should be noted that were this provision applicable generally to the Act, it would cover and include the precise situation here involved. McKenna and Pan Am are claiming the lease issued to Wallis, *not* (as the majority concedes) as “competing claimants” before the B. L. M. but (to employ the language of this special provision) “through and under Wallis) by . . . contract, or otherwise.” The majority below, of course, did not hold *this provision* applicable to the cases at bar, since it was a *special provision*. But the holding of the majority is to the effect, that Congress intended that this very provision *be supplied to the Act generally*—through the process of “federal courts must fill the interstices”!!! The majority said: “Whether the lease from the United States to Wallis was in part for the benefit of McKenna or of Pan American or of both are questions to be determined by federal law.” (App., *infra*, p. 116). **This express provision of the Act is restricted in its application by Congress, but the majority now says that Congress intended the Courts should supply this provision and make it applicable to the Act generally.**

not complied with the Act, the Court applied the rule of *Johnson v. Towsley*.⁶⁹ We submit, that in disposing of this phase of the case, the Court applied Federal law to **the extent permissible**, and, thereby disposed of the only contention asserted **to which Federal law was applicable**. But in any event, it should be observed that the Court applied to the Leasing Act, cases which dealt with the Public Land Laws, generally, and more particularly it treated the matter as though the "legal title" to the lease had vested.

On the second phase of the case, having to do with the question of a fiduciary relationship resulting from cotenancy, we submit that, the Court was sitting and functioning as any Federal court of equity would have, in a diversity case during the "pre-Erie-era." In disposing of the question, the Court noted that the rule relative to fiduciary relationship between co-tenants did not apply if, "the interests of the cotenants accrue at different times, under different instruments, and neither has superior means of information respecting the title." In support of this rule, which it called an "exception," it cited a decision by that Court and several decisions by the Supreme Courts of various States, and concluded by saying: "We know of

⁶⁹ The Court said, page 19: "... The Oil and Development Company did not obtain *what otherwise would have been granted to them*; and the principle under which the patentee was declared trustee for another in such cases as *Silver v. Ladd*, 7 Wall. 219, and *Svor v. Morris*, 227 U. S. 524, *does not apply*. *Anicker v. Gunsburg*, 246 U. S. 110, 117, holds: 'In order to maintain a suit of this sort the complainant *must establish not only that the action of the Secretary was wrong in approving the other lease, but that the complainant was himself entitled to an approval of his lease, and that it was refused to him because of an erroneous ruling of law by the Secretary.*'"

no opinion by the courts of Wyoming to the contrary."⁷⁰ It was this last statement, Wallis submits, which constituted an acknowledgment by the Court, that it was bound to follow local law, and, would have done so, if there had been a local decision from Wyoming (the situs of the property) on the question. This being the era preceding the "doctrine of abstention," and while in the pre-*Erie*-era, nevertheless under the doctrine of *Swift v. Tyson*, local decisions controlled and applied "to rights and titles to things having a permanent locality, such as rights to real estate." **This very doctrine was recognized and applied by the Fifth Circuit in a decision handed down while the case at bar was pending on rehearing, which decision was authored by the same Judge who wrote the two majority opinions below. *The Leiter Minerals, Inc., v. U. S.*, 329 F. (2d) 85 (C. C. A., 5th, March 3, 1964).**⁷¹ As respects the holding in *Leiter*, with reference to applying local law to trans-

⁷⁰ The Court said, page 20: "... This exception to the general rule is recognized in *Turner v. Sawyer*, 150 U. S. 578, 586; *Elder v. McClaskey*, 70 Fed. 529, 546; *Freeman on Co-Tenancy and Partition*, § 155; *Shelby v. Rhodes*, 105 Miss. 255, 267; *Sands v. Davis*, 40 Mich. 14, 18; *Joyce v. Dyer*, 189 Mass. 64, 67; *Steele v. Steele*, 220 Ill. 318, 323. We know of no opinion by the courts of Wyoming to the contrary."

⁷¹ In *Leiter*, the Court said, page 90: "... While this is not a diversity case controlled by the Erie doctrine (*Erie R. Co. v. Tompkins*, 1938, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188), the rules of decision act always has had 'application to state laws, strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intra-territorial in their nature and character.' *Swift v. Tyson*, 1842, 41 U. S. (16 Pet.) 1, 18, 10 L. Ed. 865. As to such matters, in the absence of a controlling decision by the highest court of the State, we should be guided by the best evidence available . . ."

actions involving real estate,⁷² the Court said: "... in the absence of a controlling decision by the highest court of the State, we should be guided by the best evidence available." We submit that this is precisely what the Court meant in the *Hodgson* case when it said: "We know of no opinion by the courts of Wyoming to the contrary." In *Clearfield Trust Co. v. U.S.*, 318 U.S. 363 (1942), and as respects *Swift v. Tyson*, this Court noted, page 367: "... And while the federal law merchant, developed for about a century under the regime of *Swift v. Tyson*, 16 Pet. 1, represented general commercial law **rather than a choice of a federal rule designed to protect a federal right**," In *Hodgson* the Court was concerned with a placer mining claim and the law applicable thereto, for it was that which gave rise to the lease, and the majority below conceded that a mining claim "was property in the fullest sense of that term." Thus being "property" and admittedly subject to local law, why would this Court in *Hodgson* have had occasion to fashion "federal law" with reference to a mining claim? In the case of *Ducie v. Ford*, *supra*,⁷³ **the sole question presented**, was the applicability of the local Statute of Frauds, where the plaintiff was attempting to assert an oral agreement with reference to a mining claim, and thus impose an equitable trust **after** the patent issued. Applicability of the local Statute was affirmed by this Court.

⁷² In *U. S. v. Certain Property, etc.*, 306 F. 2d 439 (C. C. A., 2nd, 1962), the Court said, page 444: "... Even the celebrated opinion, now rejected, upholding the power of Federal courts to disregard state decisional law in certain areas, recognized that state law should be looked to as regards 'rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intra-territorial in their nature,' *Swift v. Tyson*, 16 Pet. 1, 18, 41 U. S. 1, 18, 10 L. Ed. 865 (1842)"

⁷³ The *Ducie* case cannot be distinguished from these cases at bar.

We submit that it was error for the majority to characterize *Hodgson*, "as fashioning a federal law of fiduciary relationship . . .", and *Hodgson* is controlling in favor of Wallis.

In the case of *Witbeck v. Hardeman*, 51 F. (2d) 450 (1931),⁷⁴ **decided by the Fifth Circuit**, the Court was concerned with a mere permit to prospect for oil, issued under the Leasing Act. During the course of that decision and in considering the Leasing Act, it was stated that: "... a lease is the final action of the Land Department in disposing of the land, and in this respect is analogous to a patent."⁷⁵ While, in affirming, this Court rested its decision solely on the ground that the Secretary had properly awarded the permit, it did not take occasion to repudiate the statements made by the Fifth Circuit in its opinion.

In the case of *Alaska Consolidated Oil Fields v. Rains*, 54 F. (2d) 868 (C. C. A., 9th, 1932), the Court held that one who held an oil and gas prospecting permit issued under

⁷⁴ Affirmed *Hardeman v. Witbeck*, 286 U. S. 444 (1931).

⁷⁵ The opinion contains these statements: "... Under the Leasing Act the land of the United States is not to be conveyed by patent, but leased, so that the proprietary interest of the United States in the land never ceases. Nevertheless, *the lease is the final action of the Land Department in disposing of the land, and in this respect is analogous to a patent* . . . Furthermore, since a mere permit to prospect for oil or gas under 30 USCA § 221, is exclusive, . . ., with a preference right to lease the whole land . . ., *the permit may be of as much value and importance as the lease which it controls. The permit is itself an act of the Land Department, final so long as it lasts, and though in its inception a mere license conveying no estate in the land, it is a final grant of a valuable right pursuant to law which ought to be secured to the person to whom the law gives it* . . . It is true that neither lease nor permit ends the interest of the United States in the land involved . . . But looking at the substance of the matter, we think that the disposition of the land has already been made by the action of the Secretary in issuing a permit on the terms fixed by the law and the regulations . . ."

the Leasing Act, had "such an interest in the land" that it would be subject to a mechanic's lien for labor under the laws of Alaska."⁷⁶ As noted, this holding was **based solely** on cases relating to inceptive rights under the placer mining act.

Blackner v. McDermott, 176 F. (2d) 498 (C. C. A., 10th, 1949), **was admitted by the majority below to be contrary to its decision.** There the plaintiff, as is McKenna, was asserting a "joint venture" for the acquisition of a lease, and by virtue of the alleged "joint venture" attempting to impose an "equitable trust" upon the lease issued under the Leasing Act, and the Court stated, page 500: ". . . Jurisdiction of the Court resting upon diversity of citizenship, **and the action not being one under federal law**, the relationship of the parties each toward the other in respect of the leasehold estate **must be determined by the law of Wyoming . . .**" We have heretofore noted the case of *Oldland v. Gray*, *supra*, where the plaintiff held a prospecting permit issued under the Leasing Act, which he assigned, but under which he reserved an overriding royalty on the lease to be issued. In a suit to impress a trust upon the production obtained under the lease, the Court said, page 412: ". . . **Federal law did not create this asserted cause of action, nor is it an essential element thereof . . .** The asserted rights of the parties **arise out of a private contract**, and they must stand or fall upon its construction or effect . . ."

⁷⁶ The Court said, page 874: "*In view of the decisions with reference to the inchoate rights of a locator under the placer mining laws before discovery, and the analogous but more definitely determined rights of a locator who has acquired a prospecting permit, . . . We hold that he is an owner of an interest in the land within the meaning of the laws of Alaska under consideration, and that his interest therein is subject to a mechanic's lien, without prejudice to the rights of the government.*"

While the case of *Pan American Petroleum Corporation v. Pierson*, 284 F. (2d) 649 (C. C. A., 10th, 1960), certiorari denied 366 U.S. 936, was a suit to enjoin officials of the Land Department, yet the Court treated a lease issued under the Leasing Act as being entirely analogous to a patent to land.⁷⁷

The foregoing review of the jurisprudence relative to the Leasing Act, discloses that those who hold "inceptive rights" under the Leasing Act, as well as leases themselves, have and own a "property right" as respects third persons, and that the Land Department had granted the "legal title" thereto. Aside from the specific holding that State law governs private contracts with reference thereto, these cases treat the holders of such "rights" as being entirely analogous to those who hold such "inceptive rights" under the Public Land Laws, where the "legal title" is vested in the United States. This Court in the *Hodgson* case, applied the rule of *Johnson v. Towsley* with reference to a lease issued under the Leasing Act, and that rule proceeds on the assumption that a "legal title" had issued from the United States, and, we submit that, if that be true, then it is "property" as vested in Wallis, and, being "property," the "legal title" to which has been conveyed by the United States, then necessarily it is "property" subject to local

⁷⁷ The Court said, page 654: "... This rule is said not to be applicable in the instant case because upon the issuance of a patent title passes from the United States to the patentee whereas under the Mineral Leasing Act the United States retains legal title. * * * We deem it unnecessary to delve into the legal complexities as to whether an oil and gas lease grants a profit a prendre or creates an estate in land . . . Under each theory the government, by the issuance of the lease, has performed the last act required of it to vest in the lessee the right to explore for, produce, market and sell the oil and gas UNDERLYING THE LEASED PREMISES. SIMILARLY THE ISSUANCE OF A PATENT IS THE LAST ACT OF THE GOVERNMENT IN DISPOSING OF THE NON-MINERAL LANDS OF THE PUBLIC DOMAIN . . ."

law, at least as respects private transactions relating thereto.

On the other hand, if because it is **only a lease**, where the United States has not parted with the title to the land and because the Secretary continues to administer the lessor's rights under the lease—if these factors are such that the decisions above noted with reference to the Public Lands Laws **are not applicable** as respects Wallis' private transactions with third persons, then we are forced to ask where does the Federal court get or acquire jurisdiction to decide these cases under any law? For this very acknowledgment requires the holding that the matters are still within the jurisdiction of the Land Department, and it is the Secretary (not the Courts) who has jurisdiction under the Congressional grant of authority to administer Public Lands and the Leasing Act. In *Williams v. U.S.*, *supra*, the Court said the Secretary had the "power" to consider "equities" flowing from a private contract made with one who had an inceptive "right" to land, while the "legal title" was in the United States, and the Secretary could withhold the title. However, we submit that the Secretary has not deemed it expedient or wise to involve the Land Department in such "private transactions," and has seen fit to leave the parties to the local courts and local law. For Land Department involvement would not further its **primary function** of supervising the Public Domain and the disposing of "legal title," which of itself is a task of sufficient magnitude.⁷⁸

⁷⁸ *Best v. Humboldt Mining Co.*, *supra*, footnote 8, page 339, noted the magnitude of the work imposed upon the B. L. M. as respects mining-claim cases, saying: "In the fiscal year 1961 there were a total of 27,228 mining-claim adjudication cases closed during the year. These included 7,457 title-transfer cases (e. g., patent applications and land-disposition conflicts), and approximately 20,000 mining-claim investigations by the

Considering the foregoing jurisprudence, and its treatment of "rights" held under the Leasing Act as being similar to inceptive "rights" held under the Public Land Laws, generally, it necessarily follows that many titles to Federal leases have been acquired and dealt with on the basis of this analogy, and, on their holding that local law governs private transactions relating thereto. It is submitted that if the decision below is allowed to stand, and such titles have always been subject to a yet undefined Federal law, then many such titles have been put in jeopardy and rendered subject to question.

D. The *Boesche* Case As It Relates To Private Transactions Had By A Federal Mineral Lessee With Third Parties, Does Not Support The Decision Below.

The majority opinion on rehearing, as above noted, devoted considerable space to what this Court said in the *Boesche* case, concerning the nature of the "right" held by a lessee under the Leasing Act. While the majority did not so state, it is quite apparent that it relied on the language of the *Boesche* decision, to avoid the force and effect of the decisions above cited with reference to the Public Land Laws, generally, and, of course, those specifically interpreting the Leasing Act. We submit that this was an unwarranted and erroneous interpretation of that decision.

(⁷⁸ cont'd) Bureau's mining engineers for the purpose of determining validity or invalidity . . ." In the *Boesche* case, notice was taken of "the magnitude and complexity of the leasing program conducted by the Secretary," and reference (footnote 13) made to the fact that: "In many instances there are multiple applications for leases of the same land, sometimes hundreds for the same tract. For example, in a one-month period in 1961 there were 10,742 applications filed in the Santa Fe Land Office alone, many of which affected the same acreage . . ."

In the first place, and most important, the *Boesche* case **did not** involve a question of a Federal lessee's "rights" as respects a private transaction with third parties. That case involved **solely** the relationship and rights of a lessee as respects the United States. The cases above cited which dealt with the nature of the inceptive "rights" under the Public Land Laws, generally, and which acknowledged that such "rights" were "property" as respects third persons, at the same time, specifically **excepted** the United States. Thus *U.S. v. Buchanan*, *supra*, stated: "but as against **all except the United States** he was . . . clothed with an inceptive title." The sole question involved in *Boesche* was the administrative authority of the Secretary to cancel a lease for administrative error in its issuance.⁷⁹ That this was true, and that this was the sole question decided, is the fact that this Court was careful to point out, that: "We **hold only** that the Secretary has the power to correct administrative errors of the sort involved here by cancellation of leases . . ."

We submit, that in deciding this narrow question, this Court did not hold, nor intend to hold, that a lessee under the Act **had less** rights, or that the "rights" which he had were less in the nature of "property," than those who held inceptive "rights" under the Public Land Laws generally, all as respects dealings with third persons. As we read the decision, the burden was in showing that the lessee's "rights" fell in the same category as those who

⁷⁹ It is significant to note the comment in *Boesche* as respects *Pan American Petroleum Corporation v. Pierson*, *supra*, viz.: "Because of a seeming conflict in principle between (this case), and *Pan American Petroleum Corporation v. Pierson* . . . , we brought (this) case here." No further mention was made of that decision.

held inceptive "rights" under the other Acts, rather than being in the category of one who held a patent to the land.

Thus the Court pointed out that the Secretary has such administrative power of cancellation "with respect to other **kinds of interests in public lands,**" and said: "no matter how the **interest conveyed** is denominated the true line of demarcation is whether as a result of the transaction 'all authority or control' over the land has passed . . . or whether the Government continues to possess some measure of control over them." These statements do not deny, but on the contrary affirm, that such inceptive "rights" are "kinds of interests in public lands" and acknowledge that such "rights" are an "interest conveyed." And the foregoing cases demonstrate that such "rights" are "property" as respects third persons. Hence, when this Court said that, 'a mineral lease does not give the lessee anything approaching the full ownership of a fee patent, nor does it convey an unencumbered estate in the minerals,' it did not deny, nor, we submit, intend to infer, that such lessee did not have a "right" which was in every sense "property,"⁸⁰ in the same sense that other inceptive "rights" are treated and considered as "property."

The very lease⁸¹ which the Secretary issued to Wallis states: "**Section 1, Rights of lessee**—The lessee is **granted the exclusive right and privilege** to drill for, mine, extract, remove and dispose of all the oil and gas deposits,

⁸⁰ Section 17 of the Leasing Act (30 U. S. C. A. 226), as amended in 1935, speaks of "lease owner." App., *infra*, p. 80.

⁸¹ Item 120, Wallis' Note of Evidence. Original papers.

... in the lands leased, ... for a period of 5 years, and so long thereafter as oil or gas is produced in paying quantities ...," and it further states: "**Sec. 8. Heirs and successors-in-interest.**—It is further agreed that each obligation hereunder shall extend to and be binding upon, and every benefit shall inure to, the heirs, executors, administrators, successors, or assigns of the respective parties hereto."⁸² We ask the Court to compare the foregoing, with the language of the initial mining act (App., *infra*, pp. 96-99) of May 10, 1872, c. 152 § 3 and § 5, 17 Stat. 91, 92; R. S. § 2322 and § 2326; 30 U. S. C. A. 26, 28, which provides in part as follows: "**Sec. 26.** The locators of all mining locations ..., **their heirs and assigns**, ... shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and all of the veins, lodes ...,," and "**Sec. 28** ... On each claim located after the 10th day of May 1872, and until a patent has been issued therefor, not less than \$100 worth of labor shall be performed ... each year. On all claims located prior to the 10th day of May 1872, \$10 worth of labor shall be performed ... until a patent has been issued therefor ... and upon a failure to comply with these conditions, the claim ... shall be open to relocation ..., provided that the original locators, **their heirs, assigns, or legal representatives** have not resumed work ...," It was this language of the statute and more particularly the references to "heirs and assigns," that served as the basis for acknowledging that mining claims "are subjects of bargain and sale, ... and the right to sell, transfer, mortgage and inherit is recognized by the courts." Cf. *Forbes v. Gracey*, *supra*, and *Black v. Elkhorn Mining Company*, *supra*. Yet as noted heretofore (*supra*, footnote 51, p. 38), "A mining

⁸² Section 28 of the Leasing Act (30 U. S. C. A. 185) speaks of "lessee, assignee or beneficiary" of a lease.

location . . . is of no higher quality . . . than are unpatented claims under homestead and kindred laws."⁸³

We submit that the *Boesche* case did not render inapplicable to the "rights" of a lessee, the decisions relative to inceptive "rights" under the Public Lands Laws, generally, nor did it intend to relegate such "rights" of a lessee to any inferior or different status. And to the extent the opinion below on rehearing so interpreted it, such opinion was in error.

IV. The Majority Opinion Below On Petitions For Rehearing And The Devices Of "Assignments" And "Options."

The second majority opinion makes these statements: "We deal with claims that are, in essence, an alleged 'option' and an alleged 'assignment,' but which, ultimately, must be approved by or registered with the Secretary. We think, therefore, that there is sufficient

⁸³ In *Boesche*, while noting that a mineral lease "does not convey an unencumbered estate in the minerals," it referenced to footnote 7, saying: "In contrast, compare the interest of a mining claimant whose location is perfected." Yet the above statement, that it is "of no higher quality . . . than are unpatented claims" generally, and, *Black v. Elkhorn Mining Company, supra*, disclose there is no contrast. Moreover, in an opinion rendered by the Solicitor to the Assistant Secretary of Interior, dated January 12, 1945 (59 I. D. 4), these statements appear, pages 6, 10: ". . . Accordingly, despite some similarity, prior to discovery, in the characteristics of a lease and a prospecting permit—such as their both being subject to cancellation for cause—it was concluded that leases were, in effect, of a more permanent nature and vested the lessees with a property right and estate for years in real property. The rule adopted was said to be 'consistent with the purpose and intent of the leasing law.' * * * . On the other hand, a holder of a noncompetitive lease has an immediate leasehold interest in all of the lands subject to the lease for 5 years and a preference right to a new lease thereof prior to discovery and the right, without more, immediately upon discovery, to produce and sell any oil or gas produced . . ."

federal interest for the substantive independence of the federal court . . . * * * It might be said that the absence of a congressional definition of 'option' and 'assignment'—whether they may be oral or arise by operation of trust—implies we should look to the law of the state. But we are impressed by the fact that the [Act] represents a comprehensive scheme of federal regulation. Besides the policy directed at opposing monopoly . . . , Congress has recently expressed concern over a potentially dangerous slackening in exploration for development of domestic reserves . . . * * * It is clear that the [Act] recognizes the devices of 'assignments' and 'options' as concomitants to the public policy against monopoly . . . and . . . the public policy towards development . . . and increasing our domestic reserves." The foregoing is the essence of the predicate upon which the second opinion concluded that "the interest of the United States is directly affected" by these private transactions, and, that "this is an area for uniformity."

Several quick observations are suggested. As respects the failure of the Act to define "the terms 'assignment' and 'option'"—is this not a matter for the Secretary, under his delegated authority to administer the Act?⁸⁴ Considering the fact (as stated in the *Boesche* case) that in the debates in Congress concerning the Leasing

⁸⁴ As respects the Leasing Act, and definition of terms used therein, *California Company v. Udall*, 296 F. 2d 384 (C. C. A., D. C., 1961), says, page 388: "An administrative official charged with the duty of administering a specific statute has a duty to determine as an initial and administrative matter the meanings of terms in that statute." If the Secretary thought that the defining of the terms "assignment" and "option" in some way furthered, or were material to, the "policies" which the majority finds present, it was his province to do so. Yet the Secretary has not seen fit to define these terms, thus indicating that private contracts of "assignment" or "option," do not "directly affect" the interest of the United States, and are therefore immaterial to the "policies" of the Act.

Act "conservation through control was the dominant theme," and the further fact that the term "assignment" was in the original statute enacted in 1920—how could "recent concern . . . expressed by Congress" in 1960 over our "domestic reserves," have any bearing upon the original use of the word "assignment"?

The above quoted extracts from the second majority opinion, must be considered in the following context: Wallis, and Wallis alone, applied to the B. L. M. for the issuance of the lease, and, the lease was granted to him. At that time, and in connection with the issuance of the lease, the Secretary is presumed to have given consideration to all "policy" matters, and he is presumed to have concluded that the "policies" of the Act would be furthered by the issuance of the lease. In this light, the lease issued to Wallis. These suits seek a forced transfer of all or a portion of this lease. Local law has not said, and does not say, that transfers cannot, or could not, be made by Wallis to either of these plaintiffs. Local law does not prohibit or interdict transfers of Federal leases. Local law has simply said, in line with its public policy as reflected by the local Statute of Frauds, that the **particular private transactions** these plaintiffs had with Wallis, did not accomplish a transfer of the lease. Under these circumstances, how can it be said the "policy" of the Act is frustrated by this **negative** action of local law? Where does this "affect the interests of the United States"? How does uniformity in the decision of these transactions further the policy, or, lack of uniformity frustrate the policy? The majority gives no answers to these specific questions, it gives only general conclusions. But in the final analysis, if "uniformity" in these matters is deemed essential, is not this the province of the Secre-

tary? And is not his failure to take steps to require "uniformity" in these transactions, by appropriate regulations, evidence of his decision, and conclusion, that "uniformity" is not required?⁸⁵

A. Section 30 Of The Act Relative To The Secretary's Approval Of Assignments Or Subleases, As Interpreted By The Decision Below, Is Contrary To Past Decisions Interpreting The Leasing Act, And, Is Contrary To Sec. 30 (a) Of The Act.

The second opinion, in stating that these suits deal with a claim that is, "in essence, . . . an alleged 'assignment', but which, ultimately, must be **approved** by . . . the Secretary," is completely in error, and fails to give proper consideration to § 30 (a) (App., *infra*, p. 94) of the Act. Thus "assignments" of Federal oil and gas leases are **no longer governed** by § 30 of the Act, **insofar as discretionary authority** of the Secretary is concerned, as distinguished from merely an **administrative function**. This is manifest from the Committee Report to Congress⁸⁶ concerning the proposed 1946 amendment, which added § 30 (a) to the Act. This states, p. 4: "Section 30 (a) is added to the Mineral Leasing Act. This section is designated **to apply to oil and gas leases only, and to except such leases from sec-**

⁸⁵ In *Hill v. Williams and Liddell*, 59 I. D. 370 (1947), as respects a dispute arising out of a *private contract with a lease owner*, this statement is made, page 375: ". . . Moreover, the dispute between Hawkins on the one side and Liddell and N. S. Williams on the other side, each charging the other party with having breached the terms of their agreement of August 21, 1944, is a matter which could and should more appropriately be settled either between the parties or by suit in the courts, rather than by this Department . . ."

⁸⁶ Report of the Committee on Public Lands, to the House of Representatives; on "Amending The Mineral Leasing Act Of February 25, 1920, As Amended," Report No. 2446, 79th Congress, 2nd Session, H. Repts., 79-2, vol. 7-98.

tion 30 which will then apply to leases of minerals **other than oil and gas**. The section is designed to relieve the Department of the Interior of considerable administrative detail in approving assignments of leases and should eliminate much of the delay now incident to assignments or other transfer of leases." Here then is the clear expression of the intent of Congress that § 30 of the Act does **not apply** to the lease here involved, in light of § 30 (a), yet the opinions below relied, in the main, upon the erroneous assumption that § 30 applied, and the fact that an "assignment" of a lease "must be approved by . . . the Secretary."

As the Act was originally enacted, there was no specific statutory circumscribing of the Secretary's authority as respects the requirement of § 30 that: "No lease issued under the authority of this Act shall be assigned or sublet, except with the consent of the Secretary of the Interior." (App., *infra*, p. 93). In *Williams v. U. S.*, *supra*, the Court, in speaking of the requirement of a statute that the certification after selection of lands by a State "be approved by the Secretary" said: "It gives him no mere arbitrary discretion . . ." Thus the **original requirement** of § 30 of the Act, that an assignment or sublease of a lease must be approved by the Secretary, gave him no "arbitrary" discretion, but his action must have had a reasonable relation to the interests of the United States, the furtherance of the policy of the Act, and, an efficient administration of the Act. It should be noted that the Secretary's authority, as respects assignments and subleases, was "negative" in that he could only **refuse to approve**, he could not **require or force** an assignment or sublease of a lease. However broad the Secretary's authority and discretion may have been under § 30, as respects such required "approval", we submit that it has been entirely

circumscribed, by the addition in 1946, of § 30 (a) of the Act, which provides in part: "Sec. 30. (a) Notwithstanding anything to the contrary in section 30 hereof . . . The Secretary shall disapprove the assignment or sublease **only** for lack of qualification of the assignee or sublessee or for lack of sufficient bond." (App., *infra*, pp. 94, 95). Considering the fact that the Act gives the **right** to "assign" a lease, and the Secretary may **only** disapprove **for these two restricted reasons**, we are forced to ask, where is there any interstitial authority?⁸⁷ We submit that by the addition of § 30 (a) to the Act, the sole consideration or relevancy which an "assignment" has to the "policy," as respects "monopolies," or, "domestic reserves," has to do with the question of the extent of the "acreage holdings" of the proposed assignee. This is specifically provided for in § 30 (a), and this completely refutes the holding of the second major-

⁸⁷ It is interesting to note that when the previous "broad discretion of the Secretary as respects "approval" under Sec. 30 as originally enacted, was to be narrowly circumscribed by the proposal of Sec. 30 (a), the Secretary apparently had no apprehensions about the "policy" of the Act suffering. This is disclosed by proceedings in Congress, when the 1946 Act was before the House, for final action after being reported by the joint committee, to-wit: "Mr. Fernandez. Mr. Speaker, this bill, S. 1236, as now approved by the conferees . . . * * * The second of these amendments did not meet with the full approval of the Department. The amendment *was intended to facilitate the assignment of leases in order to relieve the bottleneck in the Department of the Interior, which has created a backlog of unapproved leases and which necessarily tends to impede and delay discovery of new petroleum reserves. The Department was fearful that assignments could be so conditioned as to relieve assignees from some of the obligations of the original lessee, and to fully safeguard the Government and to meet the criticism of the Department, the conferees on the part of the House drafted an amendment providing that upon approval of any assignment, the assignee must be bound by the obligations of the lease to the same extent as if he were the original lessee. This latter amendment was approved by the Department and was accepted by the Senate conferees and is now incorporated in the amendments.*" 79th Congress, 2nd Session, Vol. 92 Congressional Record, page 10222 (1946).

ity opinion. In the Congressional comment last noted, we direct the Court's attention to the statement, to-wit: "and to **fully safeguard the Government** and to meet the criticism of the Department,"—does not this completely negative interstitial authority?⁸⁸

Even as respects § 30 of the Act, prior to the 1946 addition of § 30 (a), the decisions interpreting § 30 did not attach any "policy" consideration to the requirement of "approval" by the Secretary, as the second majority opinion **now asserts** even with § 30 (a) added to the Act.

As a preface to a consideration of the decisions on this phase of the Act, we should first like to consider the case of *Manuel v. Wulff*, 152 U.S. 505 (1894). This case concerned the "policy" of the mining statute, of restricting the benefits of the statute to "citizens" as opposed to "aliens." That was a contest over a mining claim, both parties claiming they had validly located the claim. It developed that defendant Manuel's claim had been initially located by his brother and he had in turn conveyed the claim to Manuel, who was an alien. The lower court held that since Manuel was not a "citizen" at the time of the purported conveyance to him, such purported conveyance amounted to an abandonment of the location by the grantor. In reversing, this Court said, page 511: ". . . , we are of the opinion on this record that, as Alfred Manuel [the brother] was a citizen, if his location was valid, his claim

⁸⁸ The Committee Report referred to, *supra*, p. 66, fn. 86, discloses in connection with the proposed § 30 (a), that the Secretary of the Interior was complaining (p. 7) because it limited the Secretary's discretion to "disapprove" assignments "for good cause." And the foregoing statement to the House, by Rep. Fernandez, shows that Congress clearly intended to deny the Secretary any "discretion," as respects approval of assignments.

passed to his grantee [defendant], not by operation of law, **but by virtue of his conveyance**, and that the incapacity of the latter to take and hold by reason of alienage was, under the circumstances, **open to question by the government only.**" Here then is a case of the "policy" of the statute being given consideration and "effect," in a case involving a private transaction relating to an inceptive "right," and **this Court reversed**, holding the Act has no application to this private transaction, and that the "policy" is a matter for the government to enforce.⁸⁹ Such has been the rationale of the decisions relating to § 30 of the Leasing Act.

In one of the first cases under the Act, the same question was presented, where the plaintiff was attempting to enforce a "grubstake" agreement made with the grantee of an oil permit issued under the Leasing Act. The agreement was made prior to the issuance of the permit, but enforcement by "equitable trust" was sought, as respects the issued permit. We refer to *Isaacs v. De Hon*, 11 F. (2d) 943 (C. C. A., 9th, 1926). Defenses were asserted that (1) plaintiff did not allege he was a "citizen," and (2) "permits," under the regulations, could only be assigned with the consent of the Secretary. The Court rejected both defenses, holding the question of alienage could

⁸⁹ As respects the "policy" toward "aliens" which inheres in the Public Land Laws generally, "Bank of America," 59 I. D. 412, 414 (1947), contains this statement: "It is the general policy of the laws relating to the disposition of public lands and interests therein that aliens shall not be favored with participation in the bounty thus to be obtained from the United States. This pervading policy is to be found, for example, in the homestead laws . . . , the timber and stone laws . . . , the desert-land laws . . . , the laws pertaining to underground water reclamation grants . . . , the Taylor Grazing Act as it relates to the grazing of stock in grazing districts . . . , and the mining laws . . . It finds expression also in section 1 of the Mineral Leasing Act, . . ."

only be complained of by the sovereign, and, while it might be that plaintiff would "lose the fruits of this litigation by the refusal of the Secretary to approve the assignment," nevertheless the Court would hold defendant "to the obligations in his grubstate contract."

In *Witbeck v. Hardeman*, *supra*, the same defense was asserted as respects the required Secretary's approval of an assignment, and the Court said, page 453: "... This restriction on transfer applies to voluntary transfers, and will hardly be deemed applicable in case of death, bankruptcy, or **court decree**. But the difficulty is met by the just assumption that the Secretary intends that leases and permits shall go to those whom the law entitles to them, and when a transfer is ordered to accomplish this his consent is to be implied, and may be compelled if refused. If such a transfer be decreed, he will no doubt, on request, enter his consent thereto, and make necessary substitution of bond, and do all else that is appropriate to perfect the transfer . . ." While this Court affirmed on other grounds (*supra*, p. 55) by ruling on the merits, it does seem that if it considered the foregoing ruling to be incorrect, it would have so noted. *Alaska Consolidated Oil Fields v. Rains*, *supra*, quoted the foregoing extract from the *Witbeck* case, with approval. In *Gibbons v. Pan American Petroleum Corporation*, 262 F. (2d) 852 (C. C. A., 10th, 1958), the Court said, page 854: "The fact that the lease assignments were unapproved by the [B. L. M.] is of no moment, since the assignee could not avoid their obligations by simply not offering them for approval," citing *Blackner v. McDermott*, *supra*, and *Oldland v. Gray*, *supra*, the latter case stating at page 415: "... As we have said, the rights of the parties here do not arise out of the federal act. They

have their genesis in and derive their vitality from an agreement between the parties, which unless contrary to declared public policy, are enforceable in accordance with its terms and conditions and applicable law . . .”

The foregoing decisions interpreting § 30 of the Act, are entirely in accord with this Court’s holding in *Manuel v. Wulff*, *supra*, and it and the foregoing cases stand for the propositions that (1) private contracts or transactions concerning these “rights,” are not governed by the Act, nor the policy thereof, (2) as respects the Act and its “policy,” the Government’s rights or interests are to be asserted by the Secretary and when such private contracts are submitted for his approval, and (3) none of these cases attaches any importance or significance to § 30 of the Act, and its requirement of approval of “assignments,” as respects such private contracts or transactions, which stand on their own merits as contracts.

We submit that the foregoing discloses that the second majority opinion was entirely in error, as respects the significance it attached to the use of the word “assignment” in the Act, and the further requirement of approval of “assignments” as provided in § 30. Since the Act does not even require filing of “options” with the Secretary, much less his “approval” thereof, but only requires semi-annual filings by the optionee giving certain data as respects all “options” held by such optionee (Cf. Sec. 27 of the Act, App., *infra*, p. 92), the foregoing cases are even more decisive as respects the “importance” attached by the majority to the reference, or provision in the Act, concerning “options.”

B. Recognition By The Leasing Act Of "Options" As Concomitants To The Public Policy Against Monopoly.

The second opinion merely lumps together "assignments" and "options" as "concomitants of the public policy against monopoly" and makes absolutely no distinction between these two devices. Yet the history of the Leasing Act, and more clearly the circumstances which brought about the first legislation in 1946 with reference to "options", discloses that there is a vast difference between "options" and "assignments" insofar as the Leasing Act is concerned.

In referring to "options" as concomitants to the "public policy" against "monopoly," this can be considered as true only by treating it in its broadest sense. Yet, we submit that, when "options" are considered in light of the circumstances and background that brought about legislative regulations thereof, the majority opinion is in error as to the significance which it attaches thereto.

There is an excellent article⁹⁰ by one of the leading authorities in this country on "public lands," which, together with an opinion of the Solicitor to the Assistant Secretary of the Interior,⁹¹ reflects the history behind the 1946 amendment to § 27 of the Leasing Act (Act of August 8, 1946). Briefly summarized, these authorities are to the following effect: Originally § 27 of the Leasing Act provided that "no person, association or corporation, shall take or hold at one time oil or gas leases or permits exceeding in the aggregate" a certain limited number of acres of

⁹⁰ "Oil And Gas Leases On United States Government Lands," Ross L. Malone, Jr., 2nd Ann. Institute on Oil and Gas Law and Taxation, Southwestern Legal Foundation, page 309, 324, *et seq.*

⁹¹ 59 I. D. 4 (1945).

land in any one State. The Land Department held that acreage included in prospecting permits covered by operating agreements would not be charged against the operator, as respects the acreage limitations of the Act. The issuance of prospecting permits was eliminated in 1935, and in lieu thereof, the Act provided for issuance of noncompetitive leases on lands not within a known producing structure. Initially this attitude as respects prospecting permits was applied to noncompetitive leases until 1938, when the Department ruled that an operating contract with reference to such a lease would be charged against the operator's acreage holdings (letter to LeRoy H. Hines, dated April 19, 1938, 1708342, "L" MB). In order to avoid and circumvent the effect of this ruling, the scheme was devised of taking options to acquire leases upon their issuance on the theory that this was not an interest in real estate, and would, therefore, not be charged against the acreage holdings of the optionee. There was no official ruling from the Department but reports indicated that there were conflicting opinions among the officials thereof as to the chargeability of options under § 27 of the Act. Considerable sums of money had been invested by the industry in "options", designed, primarily, to permit the optionee to go upon land and conduct geological and geophysical exploration, and, with, of course, the right to ultimately acquire a lease from the holder thereof.

It was in recognition both of the evasiveness of the device of "options," and, the huge sums invested therein, that brought about Congressional recognition of "options" in the 1946 amendment (App., *infra*, p. 82) to Sec. 27 of the Act, and, with **an acreage limitation thereon**, when taken for the purpose of geological or geophysical

exploration, such permissible holding of "options" not to count against the acreage limitation on holdings of leases. Besides limiting the term of an "option" to two years without the approval of the Secretary, the Act did not require that "options" be filed with, or approved by, the Secretary, but only that an optionee should file a sworn declaration, semi-annually, with the Secretary, giving certain data with reference to **all options** held by the optionee within each respective State, which data was to include the number of acres covered by each "option". It will thus be seen that the recognition and regulation of "options", was primarily brought about as a means of buttressing the provisions of the Act imposing acreage limitations on control of leases, and, at the same time, facilitating geological and geophysical exploration of lands.⁹²

We wish to impress upon the Court the fact that the Act did not require the filing of option agreements with the Secretary, much less his approval (except as to a term in excess of two years), but, only required the furnishing of certain data, concerning all options so held. We submit that to the extent that options could be said to be a "concomitant" of the "policy" of the Act as opposed to monopolies, the foregoing discloses that the Congressional recognition of the device of "options" in no way requires the conclusion of the majority below that "uniformity" is necessary in the law applicable to such agreements. We

⁹² The Committee Report to Congress, on the proposed 1946 Amendment to Sec. 27 of the Act (*supra*, p. 66, fn. 86) has only this comment, with respect to the reference to "options", P. 3: "Modern technology of the industry is recognized by permitting the taking of nonrenewable options for geological or geophysical examinations of prospective areas, such options being limited to a duration of 2 years and to an area of not more than 100,000 acres in any one state. Adequate provision is made for semi-annual reporting of such options held by each optionee . . ."

submit that there is less reason in this respect, for the conclusion so reached, than in the case of "assignments" of leases, and, we further submit that, we have adequately demonstrated the error of the second opinion in its similar conclusion as respects "assignments."

G. CONCLUSION.

For the reasons stated, this petition for certiorari should be granted.

Respectfully submitted,

C. ELLIS HENICAN,
MURRAY F. CLEVELAND,
Suite 2601, 225 Baronne Street,
New Orleans, Louisiana 70112;

H. M. HOLDER,
1300 Beck Building,
Shreveport, Louisiana 71101,
Attorneys for Petitioner.

CERTIFICATE OF SERVICE.

I, MURRAY F. CLEVELAND, hereby certify that a copy of the foregoing Petition For A Writ of Certiorari, was served upon Counsel of Record in the Court below, representing Respondent Patrick A. McKenna, and, representing Respondent Pan American Petroleum Corporation, by enclosing each such copy in envelopes, duly addressed to each such Counsel of Record at his post office address, with the required air mail first class postage prepaid and affixed thereto, and depositing same in the United States Post Office at New Orleans, La., on this _____ day of July, 1965.

MURRAY F. CLEVELAND, Counsel of
Record for Petitioner.

APPENDIX.

Additional Statutes Involved.

1. Mineral Leasing Act of 1920:¹

(Act of Feb. 25, 1920; 30 U.S.C. 181, et seq.)

Sec. 1 That deposits of coal, phosphate, sodium, potassium, oil, oil shale, or gas, and lands containing such deposits owned by the United States, including those in national forests, but excluding lands acquired under the Act known as the Appalachian Forest Act, approved March 1, 1911 (36 Stat. 961), and those in incorporated cities, towns, and villages and in national parks and monuments, those acquired under other Acts subsequent to February 25, 1920, and lands within the naval petroleum and oil-shale reserves, except as hereinafter provided, shall be subject to disposition in the form and manner provided by this Act to citizens of the United States, or to associations of such citizens, or to any corporation organized under the laws of the United States, or of any State or Territory thereof, or in the case of coal, oil, oil shale, or gas, to municipalities. Citizens of another country, the laws, customs, or regulations of which deny similar or like privilege to citizens or corporations of this country, shall not by stock ownership, stock holding, or stock control, own any interest in any lease acquired under the provisions of this Act.

The United States reserves the ownership of and the right to extract helium from all gas produced from lands

¹ Wallis' oral agreement with McKenna, was had in March 1954, and this was confirmed by letter agreement in Dec. of 1954. The option agreement with Pan Am was in March, 1955. *Unless otherwise noted*, these provisions of the Act are set forth as they read, at the time of these agreements. Only Sec. 27 was amended by the Act of Aug. 2, 1954 and it is set forth prior to, and, after this amendment.

leased or otherwise granted under the provisions of this Act, under such rules and regulations as shall be prescribed by the Secretary of the Interior: *Provided further*, That in the extraction of helium from gas produced from such lands it shall be so extracted as to cause no substantial delay in the delivery of gas produced from the well to the purchaser thereof. (30 U.S.C. 181.)

Sec. 17 (as amended by Act of Aug. 21, 1935) * * *

Any lease issued after August 21, 1935 under the provisions of this section, except those earned as a preference right as provided in section 14 of this title, shall be subject to cancelation by the Secretary of the Interior after thirty days' notice upon the failure of the lessee to comply with any of the provisions of the lease, unless or until the land covered by any such lease is known to contain valuable deposits of oil or gas. Such notice in advance of cancelation shall be sent the lease owner by registered letter directed to the lease owner's record post-office address, and in case such letter shall be returned as undelivered, such notice shall also be posted ~~for a~~ period of thirty days in the United States Land Office for the district in which the land covered by such lease is situated, or in the event that there is no district land office for such leased land, then in the post office nearest such land. Leases covering lands known to contain valuable deposits of oil or gas shall be canceled only in the manner provided in section 31 of this Act. (30 U.S.C. 226.)

Sec. 18 (as originally enacted). That upon relinquishment to the United States, filed in the General Land Office within six months after the approval of this Act, of all right, title, and interest claimed and possessed

prior to July 3, 1910, and continuously since by the claimant or his predecessor in interest under the pre-existing placer mining law to any oil or gas bearing land upon which there has been drilled one or more oil or gas wells to discovery embraced in the Executive order of withdrawal issued September 27, 1909, and not within any naval petroleum reserve, and upon payment as royalty to the United States of an amount equal to the value at the time of production of one-eighth of all the oil or gas already produced except oil or gas used for production purposes on the claim, or unavoidably lost, from such land, the claimant, or his successor, if in possession of such land, undisputed by any other claimant prior to July 1, 1919, shall be entitled to a lease thereon from the United States for a period of twenty years, at a royalty of not less than 12½ per centum of all the oil or gas produced except oil or gas used for production purposes on the claim, or unavoidably lost: Provided, * * *

Upon the delivery and acceptance of the lease, as in this section provided, all suits brought by the Government affecting such lands may be settled and adjusted in accordance herewith and all moneys impounded in such suits or under the Act entitled "An Act to amend an Act entitled 'An Act to protect the locators in good faith of oil and gas lands who shall have effected an actual discovery of oil or gas on the public lands of the United States, or their successors in interest,' approved March 2, 1911," approved August 25, 1914 (Thirty-eighth Statutes at Large, page 708), shall be paid over to the parties entitled thereto. In case of conflicting claimants for leases under this section, the Secretary of the Interior is authorized to grant leases to one or more of them as shall be deemed just. All leases

hereunder shall inure to the benefit of the claimant and all persons claiming through or under him by lease, contract, or otherwise, as their interests may appear; subject, however, to the same limitation as to area and acreage as is provided for claimant in this section: Provided, * * * (30 U.S.C. 227.)

Sec. 27 (as amended by Act of Aug. 8, 1946) No person, association, or corporation, except as herein provided, shall take or hold coal, phosphate, or sodium leases or permits during the life of such leases in any one State, exceeding in the aggregate acreage two thousand five hundred and sixty acres for each of said minerals; and no person, association, or corporation, except as herein provided, shall take or hold at one time oil or gas leases exceeding in the aggregate fifteen thousand three hundred and sixty acres granted hereunder in any one State. No person, association, or corporation shall take or hold at one time any interest or interests as a member of an association or associations or as a stockholder of a corporation or corporations holding a lease or leases, permit or permits, under the provisions hereof, which, together with the area embraced in any direct holding of a lease or leases, permit or permits, under this Act, or which, together with any other interest or interests as a member of an association or associations or as a stockholder of a corporation or corporations holding a lease or leases, permit or permits, under the provisions hereof for any kind of minerals hereunder, exceeds in the aggregate an amount equivalent to the maximum number of acres of the respective kinds of minerals allowed to any one lessee or permittee under this Act. For the purpose of this Act, no contract for development and operation of any lands leased hereunder, whether or not coupled with an interest in such lease, nor any lease

or leases owned in common by two or more persons, shall be deemed to create a separate association under this section between or among such contracting parties, or the persons owning such lease or leases in common, but the proportionate interest of each such person shall be charged against the total acreage permitted to be held by such person under this Act: *Provided*, That the total acreage so held in common by two or more persons shall not exceed, in the aggregate, an amount equivalent to the maximum number of acres of the respective kind of minerals allowed to any one lessee or permittee under this Act. The interest of an optionee under a nonrenewable option to purchase or otherwise acquire one or more oil or gas leases (whether then or thereafter issued), or any interest therein, when taken for the purpose of geological or geophysical exploration, shall not, prior to the exercise of such option, be a taking or holding or control under the acreage limitation provisions of any section of this Act. No such option shall be entered into after June 1, 1946, for a period of more than two years, without the prior approval of the Secretary of the Interior, and no person, association, or corporation shall hold at one time such options of more than one hundred thousand acres in any one State: *Provided, however*, That nothing in this section shall be construed to invalidate options taken prior to June 1, 1946, and on which such geological or geophysical exploration has been actually made, and which are exercised within two years after the passage of this Act. Each holder of any such option shall file with the Secretary within ninety days after the 30th day of June and the 31st day of December in each year a statement under oath showing as of said date (1) name of optionor and serial number of lease or application for lease, (2) date and expiration date of each option, (3) number of

acres covered by each option, and (4) aggregate number of options held in each State and total acreage subject to said options in each State. If any interest in any lease is owned or controlled, directly or indirectly, by means of stock or otherwise, in violation of any of the provisions of this Act, the lease may be canceled, or the interest so owned may be forfeited, or the person so owning or controlling the interest may be compelled to dispose of the interest, in any appropriate proceeding instituted by the Attorney General. Such a proceeding shall be instituted in the United States district court for the district in which the leased property or some part thereof is located or in which the lease owner may be found, except that any ownership or interest forbidden in this Act which may be acquired by descent, will, judgment, or decree may be held for two years and not longer after its acquisition. Nothing herein contained shall be construed to limit sections 18, 18a, 19, and 22 or to prevent any number of lessees under the provisions of this Act from combining their several interests so far as may be necessary for the purposes of constructing and carrying on the business of a refinery, or of establishing and constructing as a common carrier a pipe line or lines of railroads to be operated and used by them jointly in the transportation of oil from their several wells, or from the wells of other lessees under this Act, or the transportation of coal or to increase the acreage which may be acquired or held under section 17 of this Act: *Provided*, That any combination for such purpose or purposes shall be subject to the approval of the Secretary of the Interior on application to him for permission to form the same. Except as in this Act provided, if any of the lands or deposits leased under the provisions of this Act shall be subleased, trusted, possessed, or controlled by any device perma-

nently, temporarily, directly, indirectly, tacitly, or in any manner whatsoever, so that they form a part of or are in anywise controlled by any combination in the form of an unlawful trust, with the consent of the lessee, or form the subject of any contract or conspiracy in restraint of trade in the mining or selling of coal, phosphate, oil, oil shale, gas, or sodium entered into by the lessee, or any agreement or understanding, written, verbal, or otherwise, to which such lessee shall be a party, of which his or its output is to be or become the subject, to control the price or prices thereof or of any holding of such lands by any individual, partnership, association, corporation, or control in excess of the amounts of lands provided in this Act, the lease thereof shall be forfeited by appropriate court proceedings. (30 U.S.C. 184.)

Sec. 27 (as amended by Acts of June 1, and June 3, 1948) No person, association or corporation, except as herein provided, shall take or hold coal or sodium leases or permits during the life of such lease in any one State, exceeding in the aggregate acreage five thousand one hundred and twenty acres for each of said minerals: *Provided*, That the Secretary of the Interior may, in his discretion where it is necessary in order to secure the economic mining of sodium compounds leasable under this Act, permit a person, association, or corporation to take or hold sodium leases or permits for up to fifteen thousand three hundred and sixty acres in any one State. No person, association, or corporation, except as herein provided, shall take or hold at one time oil or gas leases exceeding in the aggregate fifteen thousand three hundred and sixty acres granted hereunder in any one State; and no person, association, or corporation shall take or hold at one time phosphate leases or permits exceeding in the aggregate five thousand one

hundred and twenty acres in any one State, and exceeding in the aggregate ten thousand two hundred and forty acres in the United States. No person, association, or corporation shall take or hold at one time any interest or interests as a member of an association or associations or as a stockholder of a corporation or corporations holding a lease or leases, permit or permits, under the provisions hereof, which, together with the area embraced in any direct holding of a lease or leases, permit or permits, under this Act, or which, together with any other interest or interests as a member of an association or associations or as a stockholder of a corporation or corporations holding a lease or leases, permit or permits, under the provisions hereof for any kind of minerals hereunder, exceeds in the aggregate an amount equivalent to the maximum number of acres of the respective kinds of minerals allowed to any one lessee or permittee under this Act. For the purpose of this Act, no contract for development and operation of any lands leased hereunder, whether or not coupled with an interest in such lease, nor any lease or leases owned in common by two or more persons, shall be deemed to create a separate association under this section between or among such contracting parties, or the persons owning such lease or leases in common, but the proportionate interest of each such person shall be charged against the total acreage permitted to be held by such person under this Act: *Provided*, That the total acreage so held in common by two or more persons shall not exceed, in the aggregate, an amount equivalent to the maximum number of acres of the respective kind of minerals allowed to any one lessee or permittee under this Act. The interest of an optionee under a non-renewable option to purchase or otherwise acquire one or more oil or gas leases (whether then or thereafter issued),

or any interest therein, when taken for the purpose of geological or geophysical exploration, shall not, prior to the exercise of such option, be a taking or holding or control under the acreage limitation provisions of any section of this Act. No such option shall be entered into after June 1, 1946, for a period of more than two years, without the prior approval of the Secretary of the Interior, and no person, association, or corporation shall hold at one time such options of more than one hundred thousand acres in any one State: *Provided, however,* That nothing in this section shall be construed to invalidate options taken prior to June 1, 1946, and on which such geological or geophysical exploration has been actually made, and which are exercised on or before August 8, 1950. Each holder of any such option shall file with the Secretary within ninety days after the 30th day of June and the 31st day of December in each year a statement under oath showing as of said dates (1) name of optionor and serial number of lease or application for lease, (2) date and expiration date of each option, (3) number of acres covered by each option, and (4) aggregate number of options held in each State and total acreage subject to said options in each State. If any interest in any lease is owned or controlled, directly or indirectly, by means of stock or otherwise, in violation of any of the provisions of this Act, the lease may be canceled, or the interest so owned may be forfeited, or the person so owning or controlling the interest may be compelled to dispose of the interest, in any appropriate proceeding instituted by the Attorney General. Such a proceeding shall be instituted in the United States district court for the district in which the leased property or some part thereof is located or in which the lease owner may be found, except that any ownership or interest forbidden in this

Act which may be acquired by descent, will, judgment, or decree may be held for two years and not longer after its acquisition. Nothing herein contained shall be construed to limit sections 18, 18a, 19, and 22 or to prevent any number of lessees under the provisions of this Act from combining their several interests so far as may be necessary for the purposes of constructing and carrying on the business of a refinery, or of establishing and constructing as a common carrier a pipe line or lines of railroads to be operated and used by them jointly in the transportation of oil from their several wells, or from the wells of other lessees under this Act, or the transportation of coal or to increase the acreage which may be acquired or held under section 17 of this Act: *Provided*, That any combination for such purpose or purposes shall be subject to the approval of the Secretary of the Interior on application to him for permission to form the same. Except as in this Act provided, if any of the lands or deposits leased under the provisions of this Act shall be subleased, trusteeed, possessed, or controlled by any device permanently, temporarily, directly, indirectly, tacitly, or in any manner whatsoever, so that they form a part of or are in anywise controlled by any combination in the form of an unlawful trust, with the consent of the lessee, or form the subject of any contract or conspiracy in restraint of trade in the mining or selling of coal, phosphate, oil, oil shale, gas, or sodium entered into by the lessee, or any agreement or understanding, written, verbal, or otherwise, to which such lessee shall be a party, of which his or its output is to be or become the subject, to control the price or prices thereof or of any holding of such lands by any individual, partnership, association, corporation, or control in excess of the amounts of lands provided in this Act, the lease thereof shall be forfeited by appropriate court proceedings. (30 U.S.C. 184.)

Sec. 27 (as amended by Act of Aug. 2, 1954) No person, association, or corporation, except as herein provided, shall take or hold coal or sodium leases or permits during the life of such lease in any one State, exceeding in the aggregate acreage five thousand one hundred and twenty acres for each of said minerals: *Provided*, That the Secretary of the Interior may, in his discretion where it is necessary in order to secure the economic mining of sodium compounds leasable under this Act, permit a person, association, or corporation to take or hold sodium leases or permits for up to fifteen thousand three hundred and sixty acres in any one State. No person, association, or corporation, except as herein provided, shall take or hold at one time oil or gas leases exceeding in the aggregate forty-six thousand and eighty acres granted hereunder in any one State, except that in the Territory of Alaska no person, association, or corporation, except as herein provided, shall take or hold at one time oil or gas leases exceeding in the aggregate one hundred thousand acres granted hereunder; and no person, association, or corporation shall take or hold at one time phosphate leases or permits exceeding in the aggregate five thousand one hundred and twenty acres in any one State, and exceeding in the aggregate ten thousand two hundred and forty acres in the United States. No person, association, or corporation shall take or hold at one time any interest or interests as a member of an association or associations or as a stockholder of a corporation or corporations holding a lease or leases, permit or permits, under the provisions hereof, which, together with the area embraced in any direct holding of a lease or leases, permit or permits, under this Act, or which, together with any other interest or interests as a member of an association or associations or as a stockholder of a cor-

poration or corporations holding a lease or leases, permit or permits, under the provisions hereof for any kind of minerals hereunder, exceeds in the aggregate an amount equivalent to the maximum number of acres of the respective kinds of minerals allowed to any one lessee or permittee under this Act. For the purpose of this Act, no contract for development and operation of any lands leased hereunder, whether or not coupled with an interest in such lease, nor any lease or leases owned in common by two or more persons, shall be deemed to create a separate association under this section between or among such contracting parties, or the persons owning such lease or leases in common, but the proportionate interest of each such person shall be charged against the total acreage permitted to be held by such person under this Act: *Provided*, That the total acreage so held in common by two or more persons shall not exceed, in the aggregate, an amount equivalent to the maximum number of acres of the respective kind of minerals allowed to any one lessee or permittee under this Act. The interest of an optionee under a nonrenewable option to purchase or otherwise acquire one or more oil or gas leases (whether then or thereafter issued), or any interest therein, shall not, prior to the exercise of such option, be a taking or holding or control under the acreage limitations provisions of any section of this Act. No such option shall be entered into for a period of more than three years, without the prior approval of the Secretary of the Interior, and no person, association, or corporation shall hold at one time such options of more than two hundred thousand acres in any one State. Each holder of any such option shall file with the Secretary within ninety days after the 30th day of June and the 31st day of December in each year a statement under oath showing as of said dates

(1) name of optionor and serial number of lease or application for lease, (2) date and expiration date of each option, (3) number of acres covered by each option, and (4) aggregate number of options held in each State and total acreage subject to said options in each State. If any interest in any lease is owned or controlled, directly or indirectly, by means of stock or otherwise, in violation of any of the provisions of this Act, the lease may be canceled, or the interest so owned may be forfeited, or the person so owning or controlling the interest may be compelled to dispose of the interest, in any appropriate proceeding instituted by the Attorney General. Such a proceeding shall be instituted in the United States district court for the district in which the leased property or some part thereof is located or in which the lease owner may be found, except that any ownership or interest forbidden in this Act which may be acquired by descent, will, judgment, or decree may be held for two years and not longer after its acquisition. Nothing herein contained shall be construed to limit sections 18, 18a, 19, and 22 or to prevent any number of lessees under the provisions of this Act from combining their several interests so far as may be necessary for the purposes of constructing and carrying on the business of a refinery, or of establishing and constructing as a common carrier a pipe line or lines of railroads to be operated and used by them jointly in the transportation of oil from their several wells, or from the wells of other lessees under this Act, or the transportation of coal or to increase the acreage which may be acquired or held under section 17 of this Act: *Provided*, That any combination for such purpose or purposes shall be subject to the approval of the Secretary of the Interior on application to him for permission to form the same. Except as in this Act provided, if any of the lands

or deposits leased under the provisions of this Act shall be subleased, trustee, possessed, or controlled by any device permanently, temporarily, directly, indirectly, tacitly, or in any manner whatsoever, so that they form a part of or are in anywise controlled by any combination in the form of an unlawful trust, with the consent of the lessee, or form the subject of any contract or conspiracy in restraint of trade in the mining or selling of coal, phosphate, oil, oil shale, gas, or sodium entered into by the lessee, or any agreement or understanding, written, verbal, or otherwise, to which such lessee shall be a party, of which his or its output is to be or become the subject, to control the price or prices thereof or of any holding of such lands by any individual, partnership, association, corporation, or control in excess of the amounts of lands provided in this Act, the lease thereof shall be forfeited by appropriate court proceedings. (30 U.S.C. 184.)

Sec. 28. Rights-of-way through the public lands, including the forest reserves of the United States, may be granted by the Secretary of the Interior for pipe-line purposes for the transportation of oil or natural gas to any applicant possessing the qualifications provided in section 1 of this title, to the extent of the ground occupied by the said pipe line and twenty-five feet on each side of the same under such regulations and conditions as to survey, location, application, and use as may be prescribed by the Secretary of the Interior and upon the express condition that such pipe lines shall be constructed, operated, and maintained as common carriers and shall accept, convey, transport, or purchase without discrimination, oil or natural gas produced from Government lands in the vicinity of the pipe line in such proportionate amounts as the

Secretary of the Interior may, after a full hearing with due notice thereof to the interested parties and a proper finding of facts, determine to be reasonable: *Provided*, That the Government shall in express terms reserve and shall provide in every lease of oil lands under this Act that the lessee, assignee, or beneficiary, if owner, or operator or owner of a controlling interest in any pipe line or of any company operating the same which may be operated accessible to the oil derived from lands under such lease, shall at reasonable rates and without discrimination accept and convey the oil of the Government or of any citizen or company not the owner of any pipe line, operating a lease or purchasing gas or oil under the provisions of this Act: *Provided further*, That no right-of-way shall hereafter be granted over said lands for the transportation of oil or natural gas except under and subject to the provisions, limitations, and conditions of this section. Failure to comply with the provisions of this section or the regulations and conditions prescribed by the Secretary of the Interior shall be ground for forfeiture of the grant by the United States district court for the district in which the property, or some part thereof, is located in an appropriate proceeding. (30 U.S.C. 185.)

Sec. 30. That no lease issued under the authority of this Act shall be assigned or sublet, except with the consent of the Secretary of the Interior. The lessee may, in the discretion of the Secretary of the Interior, be permitted at any time to make written relinquishment of all rights under such a lease, and upon acceptance thereof be thereby relieved of all future obligations under said lease, and may with like consent surrender any legal subdivision of the area included within the lease. Each lease

shall contain provisions for the purpose of insuring the exercise of reasonable diligence, skill, and care in the operation of said property; a provision that such rules for the safety and welfare of the miners and for the prevention of undue waste as may be prescribed by said Secretary shall be observed, including a restriction of the workday to not exceeding eight hours in any one day for underground workers except in cases of emergency; provisions prohibiting the employment of any boy under the age of sixteen or the employment of any girl or woman, without regard to age, in any mine below the surface; provisions securing the workmen complete freedom of purchase; provision requiring the payment of wages at least twice a month in lawful money of the United States, and providing proper rules and regulations to insure the fair and just weighing or measurement of the coal mined by each miner, and such other provisions as he may deem necessary to insure the sale of the production of such leased lands to the United States and to the public at reasonable prices, for the protection of the interests of the United States, for the prevention of monopoly, and for the safeguarding of the public welfare; Provided, That none of such provisions shall be in conflict with the laws of the State in which the leased property is situated. (30 U.S.C. 187.)

Sec. 30. (a) Notwithstanding anything to the contrary in section 30 hereof, any oil or gas lease issued under the authority of this Act may be assigned or subleased, as to all or part of the acreage included therein, subject to final approval by the Secretary and as to either a divided or undivided interest therein, to any person or persons qualified to own a lease under this Act, and any assignment or sublease shall take effect as of the first day of the

lease month following the date of filing in the proper land office of three original executed counterparts thereof, together with any required bond and proof of the qualification under this Act of the assignee or sublessee to take or hold such lease or interest therein. Until such approval, however, the assignor or sublessor and his surety shall continue to be responsible for the performance of any and all obligations as if no assignment or sublease had been executed. The Secretary shall disapprove the assignment or sublease only for lack of qualification of the assignee or sublessee or for lack of sufficient bond: *Provided, however,* That the Secretary may, in his discretion, disapprove an assignment of a separate zone or deposit under any lease, or of a part of a legal subdivision. Upon approval of any assignment or sublease, the assignee or sublessee shall be bound by the terms of the lease to the same extent as if such assignee or sublessee were the original lessee, any conditions in the assignment or sublease to the contrary notwithstanding. Any partial assignment of any lease shall segregate the assigned and retained portions thereof, and as above provided, release and discharge the assignor from all obligations thereafter accruing with respect to the assigned lands; and such segregated leases shall continue in full force and effect for the primary term of the original lease, but for not less than two years after the date of discovery of oil or gas in paying quantities upon any other segregated portion of the lands originally subject to such lease. Assignments under this section may also be made of parts of leases which are in their extended term because of production, and the segregated lease of any undeveloped lands shall continue in full force and effect for two years and so long thereafter as oil or gas is produced in paying quantities. (30 U.S.C. 187a.)

Sec. 32. That the Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this Act, also to fix and determine the boundary lines of any structure, or oil or gas field, for the purposes of this Act: Provided, That nothing in this Act shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States. (30 U.S.C. 189.)

2. Mining Law:

(30 U.S.C. 26, 28; R.S. 2322, 2326)

§ 26. Locators' rights of possession and enjoyment

The locators of all mining locations made on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim existed on the 10th day of May 1872 so long as they comply with the laws of the United States, and with State, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges

shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. Nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another. R.S. § 2322.

§ 28. Mining district regulations by miners; annual labor on claims pending issue of patent; expenditure on tunnels considered

The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims made after May 10, 1872, shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the 10th day of May 1872, and until a patent has been issued therefor, not less than \$100 worth of labor shall be performed or improvements made during each year. On all claims located prior to the 10th day of May 1872, \$10 worth of labor shall be performed or improvements made each year, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such

claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. Upon the failure of any one of several coowners to contribute his proportion of the expenditures required hereby, the coowners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners who have made the required expenditures. The period within which the work required to be done annually on all unpatented mineral claims located since May 10, 1872, including such claims in the Territory of Alaska, shall commence at 12 o'clock meridian on the 1st day of July succeeding the date of location of such claim.

Where a person or company has or may run a tunnel for the purposes of developing a lode or lodes, owned by said person or company, the money so expended in said tunnel shall be taken and considered as expended on said lode or lodes, whether located prior to or since May 10, 1872; and such person or company shall not be required to perform work on the surface of said lode or lodes in order to hold the same as required by this section. On all such

valid claims the annual period ending December 31, 1921, shall continue to 12 o'clock meridian July 1, 1922. R.S. § 2324; Feb. 11, 1875, c. 41, 18 Stat. 315; Jan. 22, 1880, c. 9, § 2, 21 Stat. 61; Aug. 24, 1921, c. 84, 42 Stat. 186.

DISTRICT COURT OPINION

Patrick A. McKENNA, Plaintiff,

v.

Floyd A. WALLIS and Pan-American Petroleum
Corporation, a corporation, Defendants.

PAN AMERICAN PETROLEUM CORPORATION,
Plaintiff,

v.

Floyd A. WALLIS, Defendant.

Civ. A. Nos. 8904-B, 8937-B.

United States District Court

E. D. Louisiana,

New Orleans Division.

Dec. 26, 1961.

WRIGHT, District Judge.

These cases involve rights in a mineral lease covering about 830 acres on the oil-rich banks of Southwest Pass, one of the mouths of the Mississippi River, around the community of Burrwood in southernmost Louisiana. The common defendant, Wallis, holds his lease from the United States. He did not come by it without a fight.¹

¹ The history of his contest with Morgan, a prior applicant before the Department of the Interior, is a long one. There was an initial skirmish over the "acquired lands" filings, which Wallis lost. Then the terrain shifted to the "public domain" applications and Wallis succeeded in obtaining a preliminary ruling voiding Morgan's prior filing for technical defects. But Morgan did not acquiesce in defeat. An elaborate rehearing before the Director of the Bureau of Land Management delayed his final decision another year. Failing in that, Morgan ap-

Nor is his title yet secure.² But even if his triumph be short-lived, Wallis wants to enjoy it alone. The claimants here would spoil that hope. They assert a right to share in his victory. McKenna is his alleged co-adventurer, who claims a one-third interest in the lease; Pan American Petroleum Corporation demands an assignment of the lease under an option contract. Wallis admits the agreements, but insists they relate to another venture which came to naught. The present lease, he maintains, is the fruit of a different venture in which the claimants have no part.

[1] The chronology of this controversy begins in early 1954. Wallis uncovered the acreage in question, apparently land of the United States on which no application for a mineral lease had been filed. He promptly communicated his "find" to McKenna, who was handling other matters for him in Washington before the Department of the Interior. In the meantime, another applicant, Morgan, submitted a lease offer covering at least portions of the lands involved. But Wallis nevertheless prepared his applications, five in number, and they were filed on June 2. In

pealed to the Secretary of the Interior. By this time Wallis had an additional opponent, Strom, a later applicant who claimed a superior description of the lands. From the Secretary's rejection of their claims, Morgan and Strom prosecuted an appeal to the United States District Court for the District of Columbia. Their motion for a preliminary injunction was denied and, on February 20, 1961, summary judgment was entered in favor of Wallis. *Morgan v. Udall*, D.D.C., Civil Action No. 3248-58, 2/20/61. The court is advised that an appeal from that decision is presently pending before the Court of Appeals for the District of Columbia.

² Besides the possibility of reversal on the pending appeal in the proceedings entitled *Morgan v. Udall*, *supra*, Wallis must ultimately face the claim of the State of Louisiana in separate proceedings before this court. *State of Louisiana v. Floyd A. Wallis, et al.*, E. D. La., Civil Action No. 9046. In that suit, Louisiana asserts title to the land involved here and disputes the right of the United States to grant a lease covering that acreage.

their collaboration on this venture, Wallis and McKenna worked out an agreement,³ which was finally reduced to writing in a letter from Wallis dated December 27, 1954, approved by McKenna on January 3, 1955. Specifically referring to the applications already filed, the letter agreement recognizes in McKenna a one-third interest in those applications and in any lease to be issued thereunder.⁴

Three months later, after swift negotiations, Wallis, acting alone,⁵ granted Pan American an option to acquire any lease issued to him pursuant to the still pending applications.

[2, 3] At this point, and for some months yet, everyone concerned⁶ assumed the acreage in question was "ac-

³ Agreement was actually reached in a telephone conversation on March 18, 1954. However, relating as it did to immovables, that oral understanding did not then bind the parties. See Note 13, *infra*. Even now, though admitted under oath, it probably has no force in view of the requirement of "actual delivery" in verbal contracts affecting immovables. LSA-C.C., Art. 2275. But, in any event, since the date is not crucial and the oral contract is admitted only to the extent incorporated in the December 27 letter, we may rely on the written document as evidencing the agreement between the parties.

⁴ In view of the disposition here made, it is unnecessary to decide whether the agreement created a joint venture, or is more properly characterized as an agency coupled with an interest in view of the provision granting Wallis sole management of the undertaking. See Note 5, *infra*. In any case, as Wallis admits, the agreement was effective to transfer to McKenna an interest in the then pending applications and any lease issued thereunder.

⁵ No question is raised as to Wallis' authority to contract alone with respect to such a lease in view of the stipulation in his agreement with McKenna that "all dealings in connection with these leases shall be at [Wallis'] sole discretion and direction." McKenna complains only of Wallis' alleged misrepresentations touching on the execution of the option contract and his failure to share the \$8,300 option payment received from Pan American.

⁶ While Pan American's attorney in the option transaction, Sandel, claims to have adverted to the possibility that the acreage in question might be classified as public domain land of the United States, the evidence is clear that he personally believed it was acquired land.

quired land" of the United States,⁷ being apparently accretion to a tract purchased by the Department of the Army from a Louisiana patentee.⁸ Wallis had sought a lease under the Mineral Leasing Act for Acquired Lands, 30 U.S.C.A. § 351 et seq., which applies only to such lands.⁹ He had filed applications which would be ineffective if, as happened, the acreage were ultimately determined to be public land.¹⁰ Neither McKenna nor Pan American demurred. On the contrary, both actively supported the acquired lands theory. It was only in late 1955 or early 1956¹¹

⁷ "Acquired land," as the term implies, is land obtained by the United States through purchase or other transfer from a state or a private individual and normally dedicated to a specific use. Land owned by the United States by virtue of its sovereignty is called "public domain land."

⁸ The acreage in question is contiguous to a tract patented to Jergens by the State of Louisiana in 1898 and 1903, and sold by him in the latter year to the United States. The assumption of the parties apparently was that the area covered by the applications, being river alluvion formed by accretion or dereliction after this transaction inured to the United States, as the then owner of the banks, see LSA-C.C. Arts. 509, 510, under the same title as it held the banks, i. e., as "acquired land." Ultimately, the Director of the Bureau of Land Management, whose conclusions were affirmed by the Secretary of the Interior and also, apparently, by the District Court for the District of Columbia, determined that title to the Jergens tract never passed to the State of Louisiana, but that it was a "mud lump" which, together with all accretions thereto, including the present acreage, always was, and remains, public domain land of the United States.

⁹ The original Mineral Leasing Act of 1920, 30 U.S.C.A. § 181 et seq., with certain exceptions not here relevant, applied only to public domain lands. See *Justheim v. McKay*, D.D.C., 123 F. Supp. 560, aff'd, 97 U. S. App. D. C. 146, 229 F. 2d 29. Enacted to remedy this deficiency, the 1947 Act in terms applies only to "acquired lands" not subject to lease under the 1920 statute. 30 U.S.C.A. §§ 351, 352. See *McKenna v. Seaton*, 104 U.S. App. D. C. 50, 259 F. 2d 780, 781, n. 1.

¹⁰ The parties all agree on this point. *Seaton v. Texas Company*, 103 U.S. App. D. C. 163, 256 F. 2d 718, must be restricted to its peculiar facts.

¹¹ A dispute rages between McKenna and Wallis as to whether the realization that the land might be characterized as public domain resulted from one or another of two conferences held at the Department of Interior, or originated with Edelstein, the new attorney retained by the parties. But it is unnecessary to

that Wallis began to doubt he had guessed right about the character of the land.¹² Then, on the advice of new counsel, he submitted another application for the same tract under the "public domain lands" Mineral Leasing Act, 30 U.S.C.A. § 181 et seq. No new written agreements were entered into, nor were the old instruments amended. The question presented is whether McKenna and Pan American nevertheless acquired rights in the lease ultimately issued to Wallis under this fresh public domain application.

[4-7] The issue is very narrow under the Louisiana rule that all "contracts applying to and affecting" "oil, gas, and other mineral leases" must be reduced to writing. LSA-C.C. Arts. 2275, 2440, 2462, via LSA-R.S. 9:1105.¹³

resolve this conflict since the discovery, by mutual accord, occurred no sooner than November, 1955, nor later than February, 1956.

¹² At the very outset, Wallis had apparently considered the acreage involved public domain land. But he quickly abandoned that position and accepted the view that it was acquired land, without further question until the end of 1955.

¹³ While the legislative declaration that rights in mineral leases are "real rights and incorporeal immovable[s]," LSA-R.S. 9:1105, has not always been given full effect, see, e.g., Reagan v. Murphy, 235 La. 529, 105 So. 2d 210; Tinsley v. Seismic Explorations, Inc., 239 La. 23, 117 So. 2d 897; Hodges v. Long-Bell Petroleum Company, 240 La. 198, 121 So. 2d 831 (on rehearing); Harwood Oil & Mining Company v. Black, 240 La. 641, 124 So. 2d 764, the Louisiana Supreme Court has been consistent in reading § 1105 as requiring that contracts affecting such rights comply with the statute of frauds. Arkansas Louisiana Gas Co. v. R. O. Roy & Co., 196 La. 121, 198 So. 768; Davidson v. Midstates Oil Corporation, 211 La. 882, 31 So. 2d 7; Wier v. Glassell, 216 La. 828, 44 So. 2d 882; Acadian Production Corp. of Louisiana v. Tennant, 222 La. 653, 63 So. 2d 343. The rule applies to McKenna's agreement, whether it is considered as creating a joint venture or an agency relationship. See Stack v. De Soto Properties, 221 La. 384, 59 So. 2d 428, 430-431; LSA-C.C. Art. 2992. So does it apply to Pan American's option contract, LSA-C.C. Art. 2462.

Having failed to obtain new written agreements,¹⁴ each of the plaintiffs is compelled to rely on a single instrument. McKenna's claim is imprisoned in the letter agreement of December 27, 1954—January 3, 1955; Pan American's claim is confined to the language of the March 3, 1955 option. Except as it throws light on their original intent, the conduct of the parties after those dates is irrelevant. Any new understandings reached in 1956, 1957, 1958 or 1959 are unenforceable in the absence of a writing. Nor does it matter whether Wallis obtained his lease by breaching his trust, as alleged. If the claimants acquired an interest in the lease, it is under the written instruments, not by

Since the requirement that such contracts be in writing may affect the very existence of a cause of action or, at least, significantly affect the result, the Rule of Decision Act, 28 U.S.C. § 1652, as interpreted in *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079, compels adherence to the local law, in disregard of the more liberal policy of F. R. Civ. P. Rule 43(a), 28 U.S.C. *Macias v. Klein*, 3 Cir., 203 F. 2d 205; cf. *Kossick v. United Fruit Co.*, 365 U.S. 731, 81 S. Ct. 886, 6 L. Ed. 2d 56. See also, *Zacharie v. Franklin*, 37 U.S. (12 Peters) 151, 9 L. Ed. 1035; *Grafton v. Cummings*, 99 U.S. (9 Otto) 100, 25 L. Ed. 366; *Moses v. Lawrence County Bank*, 149 U.S. 298, 13 S. Ct. 900, 37 L. Ed. 743.

¹⁴ Despite repeated contacts with him during three and a half years preceding issuance of the lease, Pan American claims not to have known about the new application filed by Wallis, and, accordingly, says it had no occasion to ask for revision of its option contract. But such knowledge is, of course, irrelevant. Pan American is not here penalized for negligence. Either the original agreement applies to the lease issued, in which case no amendment was necessary; or it does not, in which case Wallis might properly have refused to revise the contract.

McKenna, on the other hand, knowing of the new application, immediately sought from Wallis written confirmation of his interest in any lease that might issue thereunder. The very next day after it was filed he transmitted to Wallis for execution a power of attorney covering the public domain application which acknowledged his supposed interest. Wallis refused to sign the instrument and shortly "discharged" McKenna.

virtue of any subsequent estoppel.¹⁵ Accordingly, we turn to those instruments.

[8] The letter which incorporates the agreement between Wallis and McKenna, after particularly listing and identifying certain numbered lease applications, being those filed by Wallis under the Mineral Leasing Act for Acquired Lands, confirms in McKenna "a $\frac{1}{3}$ undivided interest in the above captioned oil and gas lease applications * * * [and] such lease or leases as may be issued * * * under these captioned applications * * *" (emphasis added). Similarly, the agreement with Pan American recites the same five pending applications and grants the company "the right and option * * * to acquire any and all oil and gas leases which may be issued * * * under and by virtue of the above referred to applications." (Emphasis added.) Much is made of a second paragraph of the option agreement where Wallis promises, in general terms, to "make diligent efforts" to obtain a lease over the lands covered by the applications. But that provision does not purport to enlarge the scope of the grant.¹⁶ Thus, both instruments

¹⁵ See *Scurto v. Le Blanc*, 191 La. 136, 184 So. 567; *Pan American Production Co. v. Robichaux*, 200 La. 666, 8 So. 2d 635; *Wier v. Glassell*, supra; *Blevins v. Manufacturers Record Publishing Co.*, 235 La. 708, 105 So. (2d) 392, 414 (on rehearing), and cases there cited. Of course, if Wallis did in fact breach his agreements, he may be answerable in damages or compelled to make restitution. LSA-C.C. Arts. 1926, 1928, 1930-1934. But neither dissolution of the contracts, nor damages, are prayed for here. This is a suit for specific performance only.

¹⁶ Paragraph II of the option contract reads:

"Wallis agrees to make diligent efforts to acquire leases on, to acquire the right to lease all lands described in the above referred to applications and to obtain the issuance of leases to him covering all of said lands."

speak exclusively of an acquired lands lease. Was this an oversight?

[9-11] With scant excuse,¹⁷ the court permitted parol evidence to show the true intent of the contracting parties on the date the agreements were executed. But, not surprisingly, the documents and testimony produced only confirmed the indication of the written instruments that on January 3 and March 3, 1955, no one contemplated issuance of a lease to Wallis except in pursuance of the then pending acquired lands applications. That was all they talked about. And, quite naturally, that is all they put

Standing alone, this provision would convey nothing. It merely imposes an additional duty, supplementing the fundamental obligation recited in the first paragraph. Nor does it throw light on the subject matter of the contract. On the contrary, being a mere accessory stipulation, its apparently general terms must be considered qualified by paragraph I, which indicates precisely "the things concerning which * * * the parties intended to contract." LSA-C.C. Arts. 1959, 1961. See *State ex rel. Ditch v. Morgan's Louisiana & T. R. & S.S. Co.*, 111 La. 120, 35 So. 482; *Dufrene v. Bernstein*, 195 La. 575, 197 So. 236.

As to Sandel's claim with respect to paragraph II, see Note 18, *infra*.

¹⁷ The general rule, of course, is that, while extrinsic evidence is inadmissible when the words of the agreement are unambiguous, LSA-C.C. Arts. 1945(3), 1963, 2276, in case of doubt the court should consider what the parties said, or wrote, or did, in pursuance of their agreement. LSA-C.C. Arts. 1949, 1950, 1956. Here, the contracts may be thought unambiguous, but, in view of the liberal rule adopted by the Louisiana courts, see *Plaquemines Oil & Development Co. v. State*, 208 La. 425, 23 So. 2d 171, 174; *Gulf Refining Co. v. Garrett*, 209 La. 674, 25 So. 2d 329, 338-339 (on rehearing); *Rosenthal v. Gauthier*, 224 La. 341, 69 So. 2d 367, 369; *Simmons v. Hanson*, 228 La. 440, 82 So. 2d 757, 758-759, and, in the absence of a jury, it seemed "a reasonable, common sense exercise of judicial discretion * * * to give the benefit of the doubt to the proponent of the offered evidence, in order to avoid a remand and retrial and in the interest of determining truth through trial." *Elkins v. Townsend*, 5 Cir., 296 F. 2d 172, 177. See also, F.R. Civ. P. Rule 43(c).

into their agreements.¹⁸ Doubtless, McKenna and Pan American were both anxious to share in *any* lease Wallis might obtain over these lands. At the time, however, they saw only one means of achieving that end. Had they anticipated the ultimate issuance of a public domain lease, perhaps they would have purchased an interest in that contingency too. But that is a futile speculation. Obviously they cannot be said to have intended to buy a share in a future they did not even advert to. The conclusion must be that the written agreements faithfully record what was in the minds of the parties. Accordingly, there is no pretext for a strained construction or for reformation of the instruments. These instruments, taken alone or illumined by parol evidence, limit the claims of McKenna¹⁹ and Pan American to the acquired lands applications.

It may be true, as plaintiffs suggest, that the lease ultimately granted, pursuant to the public domain applica-

¹⁸ Indeed, Wallis' letter to McKenna, which embodies their agreement, traces almost literally the language of McKenna's prior letter requesting written confirmation of his interest.

Though Campbell, the Pan American agent who negotiated the option "deal" with Wallis, makes no such claim, Sandel, the attorney who drafted the contract, insists that paragraph II of the contract was inserted, *inter alia*, to cover the contingency that a public domain lease might be issued to Wallis, after the latter alerted him to that possibility by mentioning that Morgan had filed both types of application. But all the evidence, including Sandel's own correspondence, contradicts that assertion. Moreover, it is difficult to understand why the draftsman was not more explicit if apprized of the contingency and intending to provide for it. Under the circumstances, the allegation must be rejected. See LSA-C.C. Art. 1958.

¹⁹ Insofar as McKenna performed services beyond the obligations of his contract which contributed to the eventual issuance of the public domain lease, he may be entitled to compensation on a quantum meruit basis, or under the theory of unjust enrichment. But that is no part of his prayer in the present proceeding.

tion, is, from the lessee's point of view,²⁰ no different than one issued under an acquired lands offer. But that decides nothing. For so might a lease acquired by Wallis from the state or by assignment from Morgan, had the latter prevailed, be in all respects identical to the one in suit. Yet, clearly, neither McKenna nor Pan American could properly assert any interest in a lease obtained in that way. The important fact here is that the lease in dispute resulted from a new filing, based on a new theory, which was governed by a different statute and processed under different regulations.²¹ The public domain application cannot be viewed as a mere amendment of, or substitute for, the old offers. It stands on its own feet, holding its own priority. And the new filing in no way cancelled or superseded the earlier applications. In effect, Wallis had two irons in the same fire, in only one of which McKenna and Pan American held an interest.

[12] In short, in the administrative view, at least, the lease in question is wholly unconnected with the original acquired lands applications. Tempted as it might be to disregard technicalities, even a court of equity must

²⁰ There are differences from the lessor's point of view. Compare, e. g., 30 U.S.C.A. § 191 with 30 U.S.C.A. § 355 with respect to the disposition of moneys received by the United States as lessor.

²¹ As already noted, lease of public domain lands is governed by the Mineral Leasing Act of 1920, 30 U.S.C.A. § 181, et seq., while lease of acquired lands is governed by the Mineral Leasing Act for Acquired Lands of 1947. The latter statute adopts the rules and regulations for public lands leasing "to the extent that they are applicable," 30 U.S.C.A. § 359, but, as a matter of fact, the regulations promulgated by the Secretary of the Interior are very different. Compare, e. g., 43 C.F.R. § 192.42-192.42a with 43 C.F.R. § 200.5-200.8. The particularity with which the acquired lands applications are listed and described in the instruments in suit demonstrates that the parties themselves were aware of this difference and appreciated its importance.

recognize as a reality administrative rules and regulations which so vitally affect valuable rights.²² Thus, here, the distinction made between acquired lands leases and public domain leases cannot be ignored, and the lease issued must be viewed as the fruit of a fresh undertaking, separate and apart from the venture in which the claimants had a part. It follows that, whatever remedies they may have in separate proceedings, if Wallis dealt unfairly with them,²³ neither McKenna nor Pan American acquired any interest in the lease in suit.²⁴

Decree accordingly.

²² As Judge Hart observed during the hearing of *Morgan v. Udall*, supra: "These things get plumb technical." But, just as he did, so must this court give due weight to the administrative regulations, no matter how technical they may appear.

²³ See Notes 15 and 19, supra.

²⁴ Disposition on the grounds stated renders moot the other factual and legal issues raised. Accordingly, no finding is entered with respect to McKenna's alleged misrepresentation of his qualifications to practice before the Department of the Interior or his alleged failure to fulfill the obligations assumed under his contract with Wallis, and no conclusion is reached with respect to Pan American's apparent failure to exercise its option in writing. Nor is there any occasion to reconsider the preliminary rulings entered by order dated September 13, 1960, on Wallis' motion to dismiss.

COURT OF APPEALS OPINIONS

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19631

PATRICK A. McKENNA,

Appellant,

versus

FLOYD A. WALLIS and PAN AMERICAN
PETROLEUM CORPORATION,

Appellees.

PAN AMERICAN PETROLEUM CORPORATION,

Appellant,

versus

FLOYD A. WALLIS,

Appellee.

*Appeals from the United States District Court for the
Eastern District of Louisiana.*

(January 21, 1964.)

Before RIVES and WISDOM, Circuit Judges, and
BOOTLE, District Judge.

RIVES, Circuit Judge: These actions, involving common questions of law and fact, were consolidated in the district court and decided pursuant to an opinion reported at 200 F. Supp. 468. They involve rights asserted separately by Patrick A. McKenna and Pan American Petroleum Corporation in an oil and gas lease from the United States to Floyd A. Wallis covering 826.87 acres of exceedingly rich "mud lumps" at the mouth of the Mississippi River in Plaquemines Parish, Louisiana.

The lease was issued to Wallis on December 19, 1958, effective January 1, 1959. The lease was of public domain land, that is land in which title vested in the United States because of its sovereignty pursuant to the Mineral Leasing Act of 1920, now appearing as Title 30, U. S. C. A. § 181, et seq., as distinguished from acquired land, that is land which was once privately owned and then acquired by the United States, the leasing of which is pursuant to the Mineral Leasing Act for Acquired Lands of August 7, 1947, now appearing as Title 30, U. S. C. A. § 351, et seq.

The claims both of McKenna and of Pan American were based upon events occurring prior to the issuance of the lease to Wallis. McKenna claimed that Wallis and he were joint venturers in acquiring the lease, and that he was entitled to an undivided one-third interest in the lease. Pan American claimed that Wallis had entered into an agreement granting Pan American the option to acquire the lease thereafter issued to Wallis. The district court decided that neither McKenna nor Pan American acquired any interest in the lease upon what the court referred to as a very narrow issue, saying:

"The issue is very narrow under the Louisiana rule that all 'contracts applying to and affecting' 'oil,

gas, and other mineral leases' must be reduced to writing. LSA-C. C. Arts. 2275, 2440, 2462, via LSA-R.S. 9:1105. Having failed to obtain new written agreements, each of the plaintiffs is compelled to rely on a single instrument. McKenna's claim is imprisoned in the letter agreement of December 27, 1954-January 3, 1955; Pan American's claim is confined to the language of the March 3, 1955 option. Except as it throws light on their original intent, the conduct of the parties after those dates is irrelevant. Any new understandings reached in 1956, 1957, 1958 or 1959 are unenforceable in the absence of a writing. Nor does it matter whether Wallis obtained his lease by breaching his trust, as alleged. If the claimants acquired an interest in the lease, it is under the written instruments, not by virtue of any subsequent estoppel."

McKenna v. Wallis, E.D. La. 1961, 200 F. Supp. 468, 471, 472.

We think that the district court committed fundamental error in applying Louisiana statutes and law to determine rights in a lease on public domain land which were and are subject only to the sovereignty of the United States. The principle as to which law, state or federal, applies was stated long ago in *Wilcox v. McConnell*, 1839, 38 U.S. (13 Peters) 498, 516:

"We hold the true principle to be this, that whenever the question in any court, state or federal, is, whether a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States; but that whenever, according to those laws,

the title shall have passed, then that property, like all other property in the state, is subject to the state legislation; so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States."

Subsequent decisions have made it clear that "title" as used in that principle includes not only the legal title, but also the equitable title, indeed, the entire bundle of rights going to make up ownership. Whether the lease from the United States to Wallis was in part for the benefit of McKenna or of Pan American or of both are questions to be determined by federal law.

Irvine v. Marshall, et al., 1858, 61 U.S. (20 How.) 558, requires the application of federal law until both legal and equitable titles have passed from the United States. The United States was not a party to that litigation, but the Court recognized in clear and unmistakable terms that the United States owed a duty, to be performed both through its General Land Office and through its federal courts, to see that the equitable title as well as the legal title to public lands was vested in the proper person who proved his right under the federal law. The opinion emphasized the doctrine of resulting trusts which may have application to the facts of this case:

"With respect to resulting trusts, and the jurisdiction and duty of the courts of the United States to enforce them, the opinion of this court has been emphatically declared; and so declared in a case of peculiar force and appositeness, because it related to the acts of an agent in the entry and survey of lands, and is in its principal features essentially the same with the cause now under consideration.

We allude to the case of *Massie v. Watts*, reported in the 6th vol. of *Cranch*, p. 143. This was a suit in equity in the Circuit Court of the United States for the district of Kentucky, to compel the conveyance of land from an agent to his principal, upon the ground that the agent had withdrawn an entry on lands made in the name of his principal, had caused an entry and survey to be made in his own name, and had thereby obtained a legal title to this land. In decreeing the relief sought by the complainant, this court, expounding the law by the Chief Justice (pp. 169, 170), said: 'If *Massie* (i.e., the agent) really believed that the entry of *O'Neal* (his principal), as made, could not be surveyed, it was his duty to amend it, or to place it elsewhere. But if in this he was mistaken, it would be dangerous in the extreme—it would be a cover for fraud which could seldom be removed, if a locator alleging difficulties respecting a location might withdraw it, and take the land for himself. But *Massie*, the agent of *O'Neal*, has entered the land for himself, and obtained a patent in his own name. According to *the clearest and best established principles of equity*, the agent who so acts becomes a *trustee* for his principal. He cannot hold the land under an entry for himself, otherwise *than as a trustee for his principal*.' This exposition of the equity powers of the courts of the United States as applicable to resulting trusts—a power inseparable from the cognizance over frauds, one great province of equity jurisprudence—is conclusive.

"With respect to the power of the Federal Government to assert, through the instrumentality of its

appropriate organs, and administration of its constitutional rights and duties, and with regard to such an assertion as exemplified in the management and disposition of the public lands, and the titles thereto, the interpretation of this court has been settled too conclusively to admit of controversy." 61 U.S. at 565, 566.

The principles of law announced in repeated opinions of the Supreme Court seem to us clearly to lead to the conclusion that as to the original patent, lease or other grant from the United States, federal law controls in determining title in its broadest sense, including strictly legal title, trust rights and any and all equitable or beneficial interests. *Gibson v. Chouteau*, 1871, 80 U.S. (13 Wall.) 92, 101, 102; *Sparks v. Pierce*, 1885, 115 U.S. 408, 413; *Van Bracklin v. State of Tennessee*, 1886, 117 U.S. 151, 168; *Widdicombe v. Childers*, 1888, 124 U.S. 400, 405;¹ *Felix v. Patrick*, 1892, 145 U.S. 317, 328; *United States v. Colorado Anthracite Co.*, 1912, 225 U.S. 219, 223; *Buchser v. Buchser*, 1913, 231 U.S. 157, 161; *Ruddy v. Rossi*, 1918, 248 U.S. 104, 106, 107; see also other cases cited in 73 C. J. S. Public Lands, § 209, and 42 Am. Jur., Public Lands, § 37.

Indeed the same principle was recognized by the Supreme Court of Louisiana in the early case of *Kittridge v. Breaud*, La. 1843, 39 Am. Dec. 512, as follows:

¹ In that case, Widdicombe had got his patent but was held to be a purchaser in bad faith, the Court saying: "The holder of a legal title in bad faith must always yield to a superior equity. As against the United States his title may be good, but not as against one who had acquired a prior right from the United States in force when his purchase was made under which his patent issued. The patent vested him with the legal title, but it did not determine the equitable relations between him and third persons." 124 U. S. at 405.

"And the principle is well recognized in our jurisprudence, as well as in that of the courts of the United States, that where an equitable right, which originated before the date of the patent, whether by the first entry or otherwise, is asserted, it may be examined into: *Brush v. Ware*, 15 Pet. 93; *Bouldin v. Massie*, 7 Wheat. 149."

The Mineral Leasing Act itself makes clear that, as a part of the public policy of the United States directed at opposing the monopoly of federally-owned mineral deposits, the Bureau of Land Management must examine into the qualifications of the real lessee and of any assignee of a mineral lease or of a part interest. See sections 181 and 184 of 30 U. S. C. A. Those provisions leave no room for operation of any State law.

The same result must be reached if we follow through on the logical views expressed by the Director of the Bureau of Land Management of the United States Department of Interior in his decision sustaining Wallis' application to lease as public domain land the acreage here involved:

"What Law Then is to Control?"

"It is said in *United States v. Louisiana*, *supra* [1949, 339 U.S. 669], and *United States v. California*, *supra* [1946, 332 U.S. 19], that the resources in and under subaqueous soil of the sea are an incident to the paramount rights and power of the United States over the marginal sea; therefore, that power must be *paramount to any other power* in disposing of those resources. Since it was held

that the United States had the paramount power over and Louisiana did not have title to the marginal sea, then Louisiana must not have had a basis for legislative jurisdiction to dispose of the subaqueous soil or resources even though the United States may not have acted or entered the field. If Louisiana did not have the necessary contacts to establish a sufficient basis for legislative jurisdiction, how could any State real property law apply? The legislation and judicial decrees of a State can only apply to persons and things over which the State has jurisdiction. *Gibson v. Chouteau*, 13 Wall. 92, 99 (U.S. 1871).

"There is a strong presumption that any statute is to be construed *prima facie* territorial in effect. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357 (1908). This lack of jurisdiction is based upon the proposition that a State does *not* have the power to deny the paramount authority of the United States over the marginal sea, *United States v. Louisiana*, *supra*; '(c)alifornia, like the thirteen original colonies, never acquired ownership in the marginal sea. * * *,' *Id.*, 704; this power, or rather lack of it, has no relation to the power of a State to use or regulate the marginal sea absent conflicting Federal policy, and the question is open so far as the power of a State to extend or establish its external territorial limits *vis a'vis* persons other than the United States or those acting on its behalf are concerned. *Id.*, 705. Nothing is apposite in *Manchester v. Massachusetts*, 139 U.S. 240 (1891) (inland waters); *The Abby Dodge*, 223 U.S. 166 (1912); or *Skiriotes v. Florida*, 313 U.S. 69, 75 (1940) (both

cases involve power of a State over her citizens), for there is quite obviously a great difference between the exercise of police power, within or without the territorial boundaries of a State and the proprietary rights in land within those same boundaries. *Utah Power & Light Co. v. United States*, 243 U.S. 389, 404 (1914). The Department has taken the position that the boundary of the State of Louisiana prior to the date of the Submerged Lands Act of May 22, 1953 (67 Stat. 29; 43 U.S.C., secs. 1301-1315) was at the low water mark of the Gulf of Mexico and at that point marked by the separation of the inland waters from the open sea. *Solicitor's Opinion*, M-36239 (October 1, 1954). *United States v. Louisiana*, *supra*, implies this result. It is my opinion, based upon the above-cited authorities and analysis, that State real property law never applied to any of the subaqueous soil seaward of the inland waters within the former boundary of the State of Louisiana.

"Is State law controlling or applicable in grants and title questions involving public lands of the United States? It is a principle of law that a State cannot by legislative fiat decree a forfeiture of the public lands of the United States and proclaim title in herself. *United States v. Oregon*, 295 U.S. 1, 29 (1934). This is based upon the rule that Federal questions cannot be ultimately decided by State tribunals. *Brewer-Elliott Oil & Gas Co., et al. v. United States, et al.*, 260 U.S. 77, 87 (1922). Thus, the courts of the United States will construe the grants from the United States without reference to the rules of construction adopted by the States for

their own grants. *Packer v. Bird*, 137 U.S. 661 (1891); *Shively v. Bowlby*, 152 U.S. 1, 44 (1893) *United States v. Utah*, 283 U.S. 64, 75 (1930), states that '(s)tate laws cannot affect titles vested in the United States.' For example, the question of navigability is a Federal question, *United States v. Utah*, *supra*, 75; consequently, when the United States is disposing of a portion of its public domain, State law can no more affect the original paramount title of the United States which involves construction of one of its grants than could a State court or legislature pronounce a stream navigable with binding effect which the courts of the United States found to be non-navigable. *United States v. Oregon*, *supra*, 29; *Oklahoma v. Texas*, 258 U.S. 574, 583, 591 (1922). While the 'public land' States possess certain jurisdictional police powers over public lands of the United States situated within the State's boundaries, *McKelvey v. United States*, 260 U.S. 253, 258 (1922), those States have no basis for jurisdiction to legislate or otherwise affect title paramount to the public lands of the United States, and State real property law could in nowise divest or delimit the rights and expectations of the United States in its public lands as known at common law which is the general law followed by the courts of the United States."

We would intimate no opinion as to who may ultimately be entitled to prevail in this litigation. In our opinion, the judgment should be vacated and the cause remanded for re-trial upon the evidence already taken and any additional relevant evidence, and for full and

complete findings of fact and conclusions of law on all issues under the applicable principles of federal law.

VACATED AND REMANDED.

WISDOM, Circuit Judge, dissenting:

I respectfully dissent:

In this case there is much to be said for drawing on the "federal common law" to determine the rights of the parties. After all, the parties claim under a lease from the United States. And, in the matter of equitable remedies, the law of the forum here differs importantly from the law of the rest of the States: the civil law does not recognize resulting trusts or constructive trusts, not at least as these great tools of justice are effectively used in the common law to rectify the effects of bad faith.

But I can find no escape from the consequences of the fact that title to the lease in question passed from the United States to Wallis.

With due deference, it seems to me that *Irvine v. Marshall* does not compel an application of federal common law rather than the law of the forum. In that case no patent had yet issued to either the plaintiff or the defendant, and it was held that a state or territorial law could not be invoked to force the issuance of a certificate of title to one or the other of two competing parties. The Supreme Court recognized, however, that an entirely different rule would apply *once legal title had in fact passed from the United States*:

"We hold the true principle to be this: that whenever the question in any court, State or Federal,

is whether a title to land which was once the property of the United States has passed, that question must be resolved by the laws of the United States; but that whenever, according to those laws, the title shall have passed, then the property, like all other property in the State, is subject to state legislation, so far as that legislation is consistent with the admission, that the title passed and vested according to the laws of the United States."

Here, the United States transferred all of its lease interest to Wallis. On December 19, 1958, the Department of the Interior issued a public domain lands lease to Wallis over a prior applicant, Morgan, whose bids did not contain a sufficient description of the land. After appeals to the district court and Court of Appeals for the District of Columbia, Morgan's contentions were rejected and Wallis's right to the government lease became final. *McKenna v. Seaton*, D.C. Ct. App. 1958, 259 F. 2d 780, *cert. den'd* 358 U.S. 835, 79 S. Ct. 57, 3 L. Ed. 2d 71; *Morgan v. Udall*, D.C. Ct. App. 1962, 306 F. 2d 801, *cert. den'd* 371 U.S. 941, 83 S. Ct. 320, 9 L. Ed. 2d 275.

The case before the Court concerns a mineral lease and not a patent, but *Pan American Corporation v. Pierson*, 10 Cir. 1960, 284 F. (2d) 649, *cert. den'd* 366 U.S. 936, makes it clear that there is no distinction between a patentee and a lessee of a mineral lease, as far as passage of title to the mineral is concerned:

"We deem it unnecessary to delve into the legal complexities as to whether an oil and gas lease grants a profit a prendre or creates an estate in land. Under the first theory the lessee gains title to

the oil and gas after its severance and under the second the lessee has an ownership of the hydrocarbons in place. Under each theory the government, by the issuance of the lease, has performed the last act required of it to vest in the lessee the right to explore for, produce, market and sell the oil and gas underlying the leased premises."

Some of the decisions relied upon by the majority may be distinguished on the facts from this case. Thus *Widdicombe v. Childers*, 1888, 124 U.S. 400 and similar cases are distinguishable in that the claimant "had acquired a prior right from the United States in force when his purchase was made under which his patent issued". There is no question here, as there was in *United States v. Louisiana*, 1949, 339 U.S. 669 and *United States v. California*, 1946, 332 U.S. 19, of the paramount power of the United States over the marginal sea. The issue is not one involving the State's assertion of jurisdiction. There is no interference here with any overriding national interest. As in *Bank of America National Trust & Savings Association v. Parnell*, 1956, 352 U.S. 29, 77 S. Ct. 119, 1 L. Ed. (2d) 93, this litigation between private parties does not intrude upon national policy or the rights of the United States. When leasing its lands to individuals, unless there are special circumstances, the government acts in a proprietary capacity in the same way as does the private land owner. *Campfield v. United States*, 1897, 167 U.S. 518, 524.

If the law of the forum controls, as I think it does, although "the jurisprudence of this State has fluctuated in construing a mineral lease as being in essence a real right or a personal right, it has been consistent to the

effect that the transfer of an interest in a mineral lease cannot be made the subject of a verbal agreement and cannot be proved by parol evidence." *Hayes v. Muller*, La. App. 1962, 146 So. 2d 176, 179; certified to Supreme Court and affirmed. Louisiana law, therefore, does not allow McKenna to prove his claim to a one-third interest in the title to the lease or allow Pan American to go beyond the terms of the option agreement. Whatever rights McKenna may have to an accounting for the profits resulting from a joint venture (see *Hayes v. Muller*), or otherwise, he cannot prove title to an interest in the lease itself by parol evidence. And whatever rights Pan American may have for damages for Wallis's breach of covenant "to make diligent efforts" to accomplish the purpose of the option, the parol evidence rule bars a court enforced conveyance of a lease not covered by the option.

I would affirm the judgment of the district court, without prejudice to the plaintiffs' rights, if any, to bring new and different actions, not based on McKenna's claim to a one-third interest in the title to the lease and not based on Pan American's claim to specific performance of the option.

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1962

No. 19631

D. C. Docket No. 8904
PATRICK A. McKENNA,

Appellant,

versus

FLOYD A. WALLIS and PAN AMERICAN
PETROLEUM CORPORATION,

Appellees.

PAN AMERICAN PETROLEUM CORPORATION,
Appellant,

versus

FLOYD A. WALLIS,

Appellee.

*Appeal from the United States District Court for the
Eastern District of Louisiana.*

Before RIVES and WISDOM, Circuit Judges, and
BOOTLE, District Judge.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, vacated; and that said cause be, and it is hereby remanded to the said District Court for re-trial upon the evidence already taken and any additional relevant evidence, and for full and complete findings of fact and conclusions of law on all issues under the applicable principles of federal law, in accordance with the opinion of this Court;

It is further ordered and adjudged that the appellee, Floyd A. Wallis, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"WISDOM, Circuit Judge, dissenting"

January 21, 1964

Issued as Mandate:

COURT OF APPEALS OPINIONS AND ORDER
DENYING REHEARING

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19631

PATRICK A. McKENNA,

Appellant,

versus

FLOYD A. WALLIS and PAN AMERICAN
PETROLEUM CORPORATION,

Appellees.

PAN AMERICAN PETROLEUM CORPORATION,

Appellant,

versus

FLOYD A. WALLIS,

Appellee.

*Appeals from the United States District Court for the
Eastern District of Louisiana.*

(April 20, 1965.)

ON PETITIONS FOR REHEARING

Before RIVES and WISDOM, Circuit Judges, and
BOOTLE, District Judge.

RIVES, Circuit Judge: All parties have petitioned for rehearing and the Court has received additional briefs. In our original opinion, this Court held, Judge Wisdom dissenting, that federal law should be applied to determine rights asserted separately by Patrick A. McKenna and Pan American Petroleum Corporation in an oil and gas lease from the United States to Floyd A. Wallis covering public domain land. The district court had decided that under Louisiana law neither McKenna nor Pan American acquired any interest in the lease. We vacated the judgment and remanded the cause "for re-trial upon the evidence already taken and any additional relevant evidence, and for full and complete findings of fact and conclusions of law on all issues under the applicable principles of federal law." Pan American has petitioned for a rehearing limited to the interpretation of its claimed option agreement with Wallis, and it requests this Court to find as a fact that Wallis breached his fiduciary relationship. McKenna limits his petition for a rehearing to a request for additional findings of a joint venture between Wallis and McKenna, that Wallis breached his fiduciary obligations to McKenna and that Wallis failed to prove fraud on the part of McKenna. Wallis challenges our holding that federal law governs the claims of McKenna and Pan American and our reliance upon *Irvine v. Marshall*, 61 U.S. (20 How.) 558 (1858).

As stated in our original opinion, the United States, acting through the Secretary of the Interior, issued an oil and gas lease of public domain land to Floyd A. Wallis pursuant to the Mineral Leasing Act of 1920, 30 U. S. C. A. §

181, et seq. We have concluded that our decision should be more closely tied to that Act.

It should be noted that the actions before the district court, and before this Court on appeal, do not seek to overturn the decision of the Secretary awarding the lease to Wallis. McKenna and Pan American were not applicants who competed with Wallis before the Secretary. Indeed, it is evident that McKenna and Pan American supported Wallis's claim to the Secretary that he was the first qualified applicant for the acreage in question and entitled to a lease. If these actions were those of "competing claimants," the Secretary's decision would be subject to judicial review only if it were shown that he had acted arbitrarily or unreasonably or that his interpretation of what constitutes "public lands" was erroneous as a matter of law. *E.g.*, *Morgan v. Udall*, D.C. Cir. 1962, 306 F. (2d) 799.

We again deal with which law applies, and particularly with the contention that the Rules of Decision Act, 28 U.S.C. § 1652 (1958), requires that state law be applied to determine the claims of McKenna and Pan American to the oil and gas lease. It appears that the district court felt that the Rules of Decision Act compelled adherence to the local law. See 200 F. Supp. at 471-72, n. 13. And the Tenth Circuit has followed that view in a case involving a claim of "joint venture" highly similar to McKenna's claim here. *Blackner v. McDermott*, 10 Cir. 1949, 176 F. (2d) 498. That court held, *inter alia*, that

"... jurisdiction of the court resting upon diversity of Citizenship, and the action not being one under federal law, the relationship of the parties each toward the other in respect of the leasehold estate

must be determined by the law of Wyoming. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 . . . *Ruhlin v. New York Life Insurance Co.*, 304 U.S. 202 . . .”

176 F. 2d at 500. Although the actions in the instant case were predicated upon diversity of citizenship, and although the action is not one under federal law in the sense that federal law did not create the right of action, it does not necessarily follow that the district court was required to apply state law. The Rules of Decision Act¹ says nothing about the basis of jurisdiction. While it is true in the bulk of diversity cases the substantive issues are non federal and hence state substantive law is determinative, this is not always true.² The law applied should be keyed to the nature of the issue before the court; if nonfederal, state substantive law should be applied; if a federal matter is before the court, federal law should be applied.³ *Francis v. Southern Pacific Co.*, 1948, 333 U.S. 445, involved an action for the wrongful death of a railroad employee who was killed while riding on a free pass. Jurisdiction was predicated upon diversity of citizenship and the right of action was created by state law. Federal statutes provided extensive regulation of the giving of free passes by railroad; however, these statutes were silent as to the tort duties of a railroad to the recipient of a free pass. The Supreme Court held that federal law was to be applied and that state's tort law did not control. The “*Erie doctrine*”

¹ The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. 28 U. S. C. A. § 1652.

² See 1A Moore, Federal Practice Par. 0.305[3], at 3045 (2d ed. 1961).

³ See 1A Moore, *op cit.*, *supra*, Par. 0.305[3], at 3053.

does not annul the federal courts' responsibility to develop federal common law in aid of the uniform implementation and protection of federal interests.⁴

In summary, when jurisdiction of the federal courts is based on diversity of citizenship, all nonfederal matters will be decided by applying the law of the state in which the court is sitting while federal issues in such cases will be decided by reference to federal law. Where federal matters are involved, the specific language of valid federal statutes will control when applicable; where federal statutes do not clearly articulate the law to be applied, federal courts must fill the interstices; federal courts can do this by reference to federal or state law and the choice here depends on a number of different factors.⁵ The first question presented in the instant case is whether or not "federal matters" are involved.⁶

Prior to 1920, lands of the United States containing deposits of coal, phosphate, sodium, oil, oil shale, and gas were open to location and acquisition of title. Congress, by its mining laws, provided that claims might be "located" on these lands on the performance of certain conditions. Congress also made provision for issuing patents for claims located under the mining laws. See *Wilbur v. United States, ex rel. Krushnic*, 1930, 280 U.S. 306, 314. When the location of a mining claim was perfected under the law, it had the effect of a grant by the United States of the right of present and exclusive possession. The claim was property

⁴ 50 *Va. L. Rev.* 1236 (1964).

⁵ 1A Moore, *op cit.*, *supra* Par. 0.328, at 3901.

⁶ As one student commentator has put it: "First, the federal court must determine whether a sufficient federal interest is present to preempt the authority of state law." 50 *Va. L. Rev.* 1236, 2141 (1964).

in the fullest sense of that term and might be sold, transferred, mortgaged, and inherited without infringing any right or title of the United States. The right of the owner was taxable by the state and was "real property" subject to the lien of a judgment recovered against the owner in a state or territorial court. See *id.* at 316. However, the Mineral Leasing Act of 1920 effected a complete change of policy in respect of the disposition of lands containing deposits of coal, phosphate, sodium, potassium, oil, oil shale, or gas. Such lands were no longer to be open to location and acquisition of title, but only to lease. *Id.* at 314 (dictum). A mineral lease does not give the lessee anything approaching the full ownership of a fee patentee, nor does it convey an unencumbered estate in the minerals. *Boesche v. Udall*, 1962, 373 U.S. 472, 478 (dictum) (Secretary has authority to cancel lease granted in violation of Act and regulations promulgated thereunder). In the latter case, the Supreme Court stated that,

"Unlike a land patent, which divests the Government of title, Congress under the Mineral Leasing Act has not only reserved to the United States the fee interest in the leased land, but has also subjected the lease to exacting restrictions and continuing supervision by the Secretary."

Id. at 477-78. Thus the Secretary is given power to prescribe rules and regulations governing in minute detail all facets of the working of the land leased. 30 U. S. C. A. § 189. The Secretary may direct complete suspension of operations on such lands, 30 U. S. C. A. § 209, or require the lessee to operate under a cooperative or unit plan, 30 U.S.C.A. § 226 (j). See *Boesche v. Udall*, 1962, 373 U.S. 472, 478. And as we noted in our original opinion, the

public policy of the United States directed at opposing the monopoly of federally-owned mineral deposits requires that the Secretary examine into the qualifications of the real lessee and any assignee of a mineral lease or of a part interest. See 30 U.S.C.A. §§ 181, 184. This includes oil and gas leases "acquired directly from the Secretary under this Act or otherwise . . . (including options for such leases or interests therein)." 30 U.S.C.A. § 184 (d) (1). Such "options" are limited as to acreage, 30 U.S.C.A. § 184 (d) (1), and time, 30 U.S.C.A. § 184 (d) (2). "No option . . . shall be enforceable if entered into for a period of more than three years . . . without the prior approval of the Secretary." 30 U.S.C.A. § 184 (d) (2). By implication, "options" for less than three years may be freely entered into without prior approval. However, "No option . . . shall be enforceable until notice thereof has been filed with the Secretary . . ." 30 U.S.C.A. § 184 (d) (2). Furthermore, assignments or subleases of all or part of the acreage included in an oil or gas lease must be approved by the Secretary. See *Boesche v. Udall*, 1962, 373 U.S. 472, 478; 30 U.S.C.A. § 187a. The Secretary is required to disapprove the "assignment" or "sublease" only for lack of qualification under the Act or for lack of sufficient bond. See 30 U.S.C.A. § 187a. Nowhere in the Mineral Leasing Act of 1920 are the terms "assignment" and "option" defined.

The posture of the instant case is interstitial. The Secretary has granted a lease to Wallis. We deal with claims that are, in essence, an alleged "option" and an alleged "assignment," but which, ultimately, must be approved by or registered with the Secretary. We think, therefore, that there is a sufficient federal interest for the sub-

stantive independence of the federal court in determining the claims of McKenna and Pan American.

It might be said that the absence of a congressional definition of "option" and "assignment"—whether they may be oral or arise by operation of trust—implies that we should look to the law of the state. But we are impressed by the fact that the Mineral Leasing Act of 1920 represents a comprehensive scheme of federal regulation. Besides the public policy directed at opposing the monopoly of federally-owned mineral deposits, Congress has expressed recent concern over "a potentially dangerous slackening in exploration for development of domestic reserves of oil and gas so necessary for our security in war and peace." It removed "certain legislative obstacles to exploration for development of the mineral resources of the public lands and [to] spur greater activity for increasing our domestic reserves." S. Rep. No. 1549, 86th Cong. 2d Sess. (1960), reprinted in 1960 U.S. Code Cong. & Ad. News 3313, 3314-15. As Judge Wisdom noted in his dissent, the civil law does not recognize resulting trusts or constructive trusts and therefore the law of Louisiana differs importantly from the laws of the common-law states. While it might be said that the claim of McKenna for the assignment of part interest in the acreage covered by the lease and the claim of Pan American of the option agreement constitute transactions essentially of local concern and that the resulting litigation is "purely between private parties," we think that the interest of the United States is directly affected. Compare *Bank of America Nat'l Trust & Sav. Ass'n v. Parnell*, 1956, 352 U.S. 29, 33-34. It is clear that the Mineral Leasing Act recognizes the devices of "assignments" and "options" as concomitants to the public policy against monopoly of federally-owned mineral deposits and, on the

other hand, the public policy towards development of our mineral resources and increasing our domestic reserves. We do not think the use of these devices as a part of the scheme of carrying forth this public policy should be limited by interstitial restrictions imposed by the law of the State of Louisiana, which are not present in the other states. In a word, we think this is an area for uniformity.⁷

We hold to what we said in our original opinion in that "we would intimate no opinion as to who may ultimately be entitled to prevail in this litigation . . . [T]he judgment should be vacated and the cause remanded for re-trial upon the evidence already taken and any additional relevant evidence, and for full and complete findings of fact and conclusions of law on all issues under the applicable principles of federal law."

REHEARING DENIED.

WISDOM, Circuit Judge, dissenting:

I respectfully dissent.

I do not say that the Court's decision is likely to start dangerous temblors in American federalism. It has always been in the cards that federal common law would expand as the activities of the national government expanded.¹ For many years, before *Erie*, the federal "judge followed his own nose"; he "sat down and looked up what relevant federal law there might be in the cases and other-

⁷ *Hodgson v. Federal Oil & Development Co.*, 1927, 274 U. S. 15, does not lead to a different result. We read *Hodgson* as fashioning a federal law of fiduciary relationship by drawing on the law of several states. See *id.* at 19-20.

¹ See Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. Pa. L. Rev. 797 (1957).

wise decided what the law ought to be . . . though in some few instances the judge might consider relevant state decisions".² Moreover, I agree with Judge Henry Friendly's summary of the development, since *Erie*, of the "new" federal common law: "We may not have achieved the best of all possible worlds with respect to the relationship between state and federal law. But the combination of *Erie* with *Clearfield* and *Lincoln Mills* has brought us to a far, far better one than we have ever known before."³ I do say that in this case the Court's resort to federal common law is so inappropriate as to amount to a deep and uncalled-for cut against the grain of American federalism.

I.

We sit as an *Erie* court, bound by the law of Louisiana; bound too by the Rules of Decision Act. Yet in this squabble between private persons the Court holds that the nature of the ownership of the lease, that is, the nature of the lessee's interest in the minerals as against third party claimants, is a matter to be determined by judge-made federal common law. The Court brushes aside the state's longstanding public policies against title by parol⁴ and

² Morgan, *The Future of a Federal Common Law*, 17 Ala. L. Rev. 10, 12 (1964).

³ Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 422 (1964).

⁴ In the opinion below Judge Wright correctly noted: "While the legislative declaration that rights in mineral leases are 'real rights and incorporeal immovable[s].' LSA-R.S. 9:1105, has not always been given full effect. (citing cases) . . . [T]he Louisiana Supreme Court has been consistent in reading § 1105 as requiring that contracts affecting such rights comply with the statute of frauds. *Arkansas Louisiana Gas Co. v. R. O. Roy & Co.*, 196 La. 121, 198 So. 768; *Davidson v. Midstates Oil Corporation*, 211 La. 882, 31 So. 2d 7; *Wier v. Glassell*, 216 La. 828, 44 So. 2d 882; *Acadian Production Corp.*

against resulting and constructive trusts, devices alien to the civil law.⁵ The "jurisprudence of this State . . . has

of *Louisiana v. Tennant*, 222 La. 653, 63 So. 2d 343. . . . The rule applies to McKenna's agreement, whether it is considered as creating a joint venture or an agency relationship. See *Stack v. De Soto Properties*, 221 La. 384, 59 So. 2d 428, 430-431; LSA-C.C. Art. 2992. So does it apply to Pan American's option contract. LSA-C.C. Art. 2462." *McKenna v. Wallis*, E. D. La. 1961, 200 F. Supp. 468, n. 13 at 471. In *Hayes v. Muller*, La. App. 1962, 146 So. 2d 176, 179, the court held that an alleged joint venture effecting the transfer of an interest in a mineral lease cannot be made the subject of a verbal agreement and cannot be proved by parol evidence. The Louisiana Supreme Court affirmed, 245 La. 356, 158 So. 2d 191, 198, commenting, on rehearing, that it had been "zealous . . . to guard against any deviation from the rule" that the "plaintiff cannot show an oral agreement to purchase property for him, and enforce the contract when it has been fraudulently violated (by acquisition in defendant's name), despite the argument made therein that the evidence did not constitute an attack on the title of the defendant but was merely an attempt to profit from and through such title."

⁵ "Article 21 of the Louisiana Civil Code of 1870 authorizes the courts to apply equitable principles in their decisions. *Porter v. Conway*, 181 La. 487, 159 So. 725 (1934); see *Willey v. St. Charles Hotel*, 52 La. Ann. 1581, 1584, 28 So. 182, 186 (1899); see *Franklin, Equity in Louisiana*, 9 Tulane L. Rev. 485 (1935). However, it is frequently stated that from a theoretical viewpoint there can be no constructive trust in a civil law jurisdiction. See *Patton, Future of Trust Legislation in Latin America*, 20 Tulane L. Rev. 542, 548 (1946); see *Wisdom, The Louisiana Trust Estates Act*, 13 Tulane L. Rev. 70, 83 (1938)." Note 26 Tul. L. Rev. 262 (1952). See also Note, 25 La. L. Rev. 276, 280 (1964).

Since all transfers of immovable property must be in writing and, under LSA-C.C. Arts. 2275, 2276, 2440, parol evidence is not admissible to vary the terms of a written conveyance or to prove an oral agreement of sale, a defrauded principal or joint venturer cannot through parol evidence prove title to immovables purchased by an agent or joint venturer under an oral mandate. *Scrito v. LeBlanc*, 191 La. 137, 184 So. 567 (1938); *Ceromi v. Harris*, 187 La. 701, 175 So. 462 (1930); see Note, 21 Tulane L. Rev. 286 (1946). However, parol evidence may be used to prove fraud or error in an action to rescind written sales of real estate. *Baker v. Baker*, 219 La. 1041, 26 So. 2d 132 (1946); *LeBleu v. Savoie*, 109 La. 680, 33 So. 729 (1903); cf. *Reid v. Phillips*, 177 La. 497, 148 So. 690 (1933).

There are, however, a number of loose references in Louisiana decisions to "constructive trusts". *McClendon v. Bradford*, 42

been consistent to the effect that the transfer of an interest in a mineral lease cannot be made the subject of a verbal agreement and cannot be proved by parol evidence". *Hayes v. Muller*, La. App. 1962, 146 So. 2d 176, 179. On remand, the law the district judge must conjure up is as uncertain and insubstantial as the "brooding omnipresence in the sky", of which Justice Holmes spoke, because this evanes-

La. Ann. 160, 7 So. 78 (1890); *Gervais v. Gervais*, 9 Orl. App. 69 (1911); *Gaines v. Chew*, 2 How. 619, 650 (U. S. 1844); *Berthelot v. Isaacson*, 5 Cir. 1922, 278 Fed. 921, 923. A result similar to the common law constructive trust has been attained in Louisiana decisions holding that title to *movable* property which is acquired by an agent through a breach of his fiduciary duty inures to the benefit of the principal. *Sentell v. Richardson*, 211 La. 288, 29 So. 2d 852 (1947); noted in 22 Tulane L. Rev. 196, and 8 La. L. Rev. 223 (1948) (purchase of hospital stock). Or when an agent acquires his principal's property by fraud or error. *Assunto v. Coleman*, 158 La. 537, 104 So. 318 (1925) (agent purchased principal's property at judicial sale).

Mansfield Hardwood Lumber Co. v. Johnson, 5 Cir. 1959, 268 F.2d 317, 319, 324, is a good example of federal court handling of Louisiana decisions in this area of the law. There this Court agreed "that the Louisiana Civil Law prohibits the imposition of a constructive trust or equitable lien on property". The Court recognized however that under LSA-C.C. Art. 1847 "a breach of the fiduciary relationship is called fraud [not constructive fraud] and the remedy is, of course, a rescission of the contract or damages. By bringing such relationship under the broad heading of fraud, the Louisiana courts have, in effect, reached the same results as would be reached under the common-law-results which seem to common-law lawyers hard to obtain under a literal interpretation of the Civil Code." Accordingly, in *Mansfield* the district court rescinded the sale of the plaintiff's stock to the defendant, recognized the plaintiffs as the owners of the stock, and ordered the defendant to render an accounting to the plaintiffs. All of this adds up to the fact that by different theories the civil law reaches many of the results the common law reaches. There is no exact civilian equivalent to the Angola-American resulting trust or constructive trust. Here, the claimants may suffer from the difference between the two legal systems. But the difference in remedies generally is not so great as to justify the majority's far-out idea that Louisiana's lack of resulting and constructive trusts, as the Lord Chancellor knows them, substantially interferes with the national policy on mineral reserves.

cent law is *not* the articulate voice of a sovereign that can be identified.⁶

The holding of the Court carries alarming implications. If federal common law controls and the claimants hold an equitable title by virtue of a constructive trust, what is Mrs. Wallis's interest? Assuming that Wallis has a part interest as lessee, does his wife have half of his interest as her share in the community? Or is she a common law partner with him? Or does she have no interest in the lease? Are Wallis's children deprived of their legitime, their forced portion of their father's estate, as to their father's interest in the lease? I hope my fears are all bloodless ghosts. But if a federal court, in the name of interstitial law-making, may concoct a Law of Property, Law of Contracts, Law of Restitution and, perhaps, a Law of Descent and Distribution for Mississippi Mud-Lumps, I foresee the fashioning of some fancy legal systems for a great many federal enclaves within the borders of the states.⁷

II.

"There is", of course, "no federal general common law".⁸ However, the term "federal common law", like Jus-

⁶ "The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi-sovereign that can be identified." *Southern Pacific Co. v. Jensen*, , 244 U. S. 205, 222, 37 S. Ct. 524, 61 L. Ed. 1086, cf. *Clark, State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 Yale L. J. 205, 274 (1946).

⁷ "Establishing a body of substantive law for federal courts in matters not otherwise of federal concern is not a legitimate end within the scope of the Constitution; thus to frustrate the ability of the states to make their laws fully effective in areas generally reserved to them would be inconsistent with the constitutional plan." Friendly, *supra*, n. 3 at 397.

⁸ *Erie R. Co. v. Tompkins*, 1938, 304 U. S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188.

tice Rutledge's substitute term, "law of independent judicial decision",⁹ is an acceptable euphemism for federal judicial legislation. No one can quarrel with such law-making when congressional intent and national interest speak in the loud, clear voice of the sovereign. But the fact that there are interstices in a federal statute is not enough in itself to justify a court's applying federal common law. There are interstices in every statute.

Before a court plugs a statutory gap with federal law that is inconsistent with local law and that here is also contrary to established state policies, consideration for the position of the states in the federal system suggests that the Court find congressional intent that federal common law should prevail over state law.¹⁰ "The political logic of federalism supports placing the burden of persuasion on those urging national action."¹¹ When congressional intent is unclear or when a specific congressional intent never existed, a reasonable criterion is that judge-made common law should not prevail over local law unless that result is manifestly in the national interest. Uniformity for uniformity's sake does not meet this criterion; under *Erie* and the Rules of Decision Act, diverse local law controls the hum-drum disputes of private litigation that do

⁹ *United States v. Standard Oil Co.*, 1947, 332 U. S. 301, 308, 67 S. Ct. 1064, 91 L. Ed. 2067.

¹⁰ "The issue that must be determined in each instance is what heed Congress intended to have paid to state law in an area where no heed need constitutionally be paid—more realistically, in Gray's famous phrase, 'to guess what it would have intended on a point not present to its mind, if the point had been present.' We cannot expect that we shall always agree with the answer to such a question; we do have a right to expect that the question shall always be put." Friendly, n. 3, at 410.

¹¹ Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 *Colum. L. Rev.* 543, 545 (1954).

not raise a federal question and do not conflict with the interests of United States. In this case, I find no congressional intent and no compelling national interest sufficient to justify an independent federal rule displacing long accepted state law.

This is a dog-eat-dog, no-holds-barred fight between private persons, each crying foul, over the nature of the ownership of a lease. Resolution of the controversy depends upon legally acceptable proof of the relationship of Wallis to McKenna and Pan-American. It is true that the acts generating the litigation took place before execution of the lease. The point in time when these acts occurred, however, is not important to the United States as lessor, as it was in *Irvine v. Marshall*, 1858, 20 How. 558, 15 L. Ed. 994, since the dispute arose *after title to the mineral leasehold had passed from the United States to Wallis*.¹² Besides,

¹² In the instant case the entire title, legal and equitable, to the mineral leasehold passed at the time the lease was executed. In *Irvine v. Marshall*, on which the Court relied so strongly in the original opinion, the patent had not been issued to either of the competing parties. The Supreme Court recognized, however, that an entirely different rule would apply *once legal title had in fact passed from the United States*:

"We hold the true principle to be this: that whenever the question in any court, State or Federal, is whether a title to land which was once the property of the United States has passed, that question must be resolved by the laws of the United States; but that whenever, according to those laws, the title shall have passed, then the property, like all other property in the State, is subject to state legislation, so far as that legislation is consistent with the admission, that the title passed and vested according to the laws of the United States."

Pan American Petroleum Corporation v. Pierson, 10 Cir. 1960, 284 F.2d 649, cert. denied, 366 U. S. 936 supports Wallis's position. The Court held that the Secretary has no "authority to cancel an oil and gas lease for fraud of a lessee precedent to lease issuance". The Court said: "[T]he government, by the issuance of the lease, has performed the last act required of it to vest in the lessee the right to explore for, produce, market and sell the oil and gas underlying the leased premises."

McKenna and Pan-American do not question the validity or effectiveness of the transfer of the mineral leasehold from the United States to Wallis. On the contrary, it is essential to their position that they accept the validity of Wallis's lease: McKenna claims a one-third interest in the lease as a joint venturer; Pan-American demands an assignment of the lease under an option contract.

Whether Wallis holds the lease for himself or for others and whatever the interests of McKenna and Pan-American may be as against Wallis, the United States is protected by the terms of the lease and by statutory requirements that the Secretary of Interior investigate and approve Wallis and any assignee or sublessee. The United States owns the fee and exercises tight control over the lease through the Secretary's power to prescribe rules and regulations governing in minute detail all facets of the working of the land leased.

The United States has of course a proper interest in knowing the nature of the lessee's ownership. In the first place, the policies of the United States in favor of conservation of national resources and prevention of monopolies require the Secretary to know the true owners of the lease. The Act provides, therefore, for full disclosure of the lessee's interest in order to prevent lease-grabbing through

284 F.2d at 654. The effect of this decision is uncertain, however, in view of *Boesche v. Udall*, 1963, U.S. , 83 S. Ct. , L.Ed.2d , holding that the Secretary has the administrative power, beyond § 31 of the Act, to cancel a lease because of an administrative error; § 31, allowing cancellation for the lessee's non-compliance with any of the provisions of the lease, applies only to situations in which a valid lease has been issued. The Court in *Boesche* was aware of *Pan American*, but did not discuss the case and spoke only in terms of administrative error. See Miller, *The Historical Development of the Oil and Gas Laws of the United States*, 51 Col. L. Rev. 506, 530 (1963).

the use of strawmen. Second, for obvious reasons, it is administratively convenient for the Secretary to deal with the record owner as the true owner. In general, these policies and interests will necessarily be affected adversely by the common law's recognition of unwritten, undisclosed trusts arising from the breach of a fiduciary relationship unknown to the Secretary. On the other hand, the civilian antipathy to oral, hidden trusts and equitable liens works hand in glove with the policies and interests of the United States. Certainly in this case, Judge Wright's adjudication that McKenna and Pan-American have no provable claim to the lease represents the optimum Congress and the Secretary could expect in administrative convenience and in the disclosure of outside interests.

Beyond all of this, a serious question exists as to whether the doctrine of separation of powers permits the judiciary, in effect, to force lessees upon the executive. And there is also the question whether the Act allows a court to select as assignees persons whom the Secretary has not investigated and formally approved. The policy objectives of the statute and its protective provisions may be easily circumvented, if courts have the power to reverse the Secretary's choice of lessee by recognizing third parties as the legal lessees by virtue of an unwritten option, assignment, or joint venture.

III.

In concluding that the issue for decision is a federal matter the Court, if I may say so, relied on this syllogism: (1) the federal Mineral Leasing Act permits options and assignments of leases approved by the Secretary; (2) here, in essence, the claims are an alleged option and an alleged

assignment; (3) therefore the claims are a federal matter. This reasoning does not stand up.

The Court's conclusion is a glaring non sequitur, unless the terms "option" and "assignment" are taken to include contested, amorphous claims such as McKenna and Pan-American present. But this is an impossible construction of the Act. Congress could have intended only that the Secretary approve uncontested options and assignments or, possibly, such agreements validated by adjudication. If a court has decreed the validity of a formal lessee's total ownership of a lease against third persons, or, in another case, if a court should validate all or part of the transfer of a lessee's interest, it is difficult for me to understand what difference it makes to the United States whether the Court used state law or federal common law.

The Secretary has the ability to prevent a lease from falling into the hands of someone who should not have it. The Secretary's determination that a lease or an assignment of a lease meets the requirements of the Act evidences compliance with the rules and regulations protecting the interests of the United States. That determination is unquestionably a federal matter. But the rights of action, if any, of McKenna and Pan-American against Wallis are state-created. And their validity or invalidity is determinable without regard to the Act, the regulations, or the Secretary's approval. In short, here, as in tax law or in federal procedure or in many other areas of the law where the nature of a litigant's interest unquestionably is important to the federal government—absent a conflict between the State and the Nation, accepted principles of federalism recognize that state law should determine the nature of the litigant's property interest, and federal law

should determine the federal rules applicable to that particular type of property ownership.¹³

The Court's reasoning seems to overlook McKenna. McKenna claimed as a joint venturer, not as an assignee. I do not see how his claim can be lumped with Pan-American's claim. If the reference in the Act to secretarial approval of options and assignments makes a federal matter of all litigation touching such contracts, the statutory silence with respect to joint ventures should be taken to mean that McKenna's alleged joint venture with Wallis is not a federal matter. I do not underscore this point. I mention it only to demonstrate that no special federal significance should be attached to the mention of "options" and "assignments" when it is manifest that the Secretary's approval of all original leases and all transfers is required under the Act.

IV.

After finding that the plaintiffs' claims were "federal matters," the Court still could not fashion and apply federal common law without first holding that application of state law would seriously affect adversely the interests

¹³ Professor Hart comments: "But the decisions yield no simple rule of thumb for choosing. They cannot. Particularly is this so in the subtler situations in which federal legislation is building upon legal relationships established by the states and its power is one of characterization only and not of alteration of the substance of the relation. Federal tax law, for example, can say what state-created interests are to be taxed, and can characterize them in any way it chooses; but it cannot create the interests. Similarly, federal bankruptcy law can dissolve state-created interests in any way it thinks equitable; but it is hard to see how it can create, or recognize in liquidation, interests which never had any existence under state law." Hart, *The Relations Between State and Federal Law*, 54 Col. L. Rev. 489, 535 (1954).

of the United States. The Court managed this conclusion in just one sentence:

"We do not think the use of these devices [assignments and options] as a part of the scheme of carrying forth this public policy [the development of our mineral resources and increasing our domestic reserves] should be limited by the interstitial restrictions imposed by the law of the State of Louisiana, which are not present in the other states."

The fact is, Louisiana imposes no special limitations, interstitial or otherwise, on assignments and options. Louisiana does require, as do common law states, that all contracts affecting immovables (real property), including mineral leases, be in writing. The Statute of Frauds is no stranger to the common law. The only pertinent Louisiana limitation affecting mineral leases is the rule against resulting and constructive trusts. This established civilian principle,—as a practical matter, a principle rarely called into operation—is the sole and narrow basis for the Court's holding that if state law is applied the Nation will suffer.

If this one-sentence finding on which the Court's decision rests is corrected and paraphrased realistically, the holding shakes down to this bizarre result:

Trusts *ex maleficio* are part of the congressional scheme for carrying out the national policies on mineral resources and monopoly. In litigation between private persons over the nature of the ownership of a federal mineral lease, as among themselves, national policies on mineral resources and monopoly will suffer unless courts recognize beneficial title to the lease in a claimant whom the Secretary has

not investigated, has not approved as lessee, and may be unknown to the Secretary.

To restate this holding in accurate, realistic terms is to expose the unreal, speculative character of the Court's notion that federal common law controls this case.

V.

I find no decisional and no doctrinal support in the majority's position. I turn now to a small sampling of leading cases.

Clearfield Trust Co. v. United States, 1943, 318 U.S. 363, 63 S. Ct. 573, 87 L. Ed. 838, was the Supreme Court's first important decision on federal common law after *Erie*. The United States sued to recover on an express guaranty of prior endorsements on a government check containing a forged endorsement. The court held that state law was inapplicable. The United States was a party to the litigation, but more importantly since the right of the United States to recover for conversion of a government check is a federal right, the courts of the United States could properly formulate a rule of decision. Uniformity was desirable; state law would be "singularly inappropriate" because its application to commercial paper of the United States "would subject the rights and duties of the United States to exceptional uncertainty".

Mr. Justice Douglas, author of the *Clearfield* opinion has recently cast some doubt on its scope:

As respects the creation in the federal court of common-law rights, it is perhaps needless to state that we are not in the free-wheeling days antedating

Erie R. Co. v. Tompkins, 304 U.S. 64. *The instances where we have created federal common law are few and restricted.* In *Clearfield Trust Co. v. United States*, 318 U.S. 363, we created federal common law to govern transactions in the commercial paper of the United States; and we did so in view of the desirability of a uniform rule in that area. *Id.*, p. 367. But even that rule was qualified in *Bank of America v. Parnell*, 352 U.S. 29. (Emphasis supplied.) *Wheedlin v. Wheeler*, 1963, 373 U.S. 647, 83 S. Ct. 1441, 10 L. Ed. 2d 605.

This brings us to *Bank of America National Trust and Savings Association v. Parnell*, 1956, 352 U.S. 29, 77 S. Ct. 119, 1 L. Ed. 2d 93, one of the two authorities cited in the opinion on rehearing for the majority's principal holding. As in the instant case, *Parnell* was a diversity action between private persons. The suit was over stolen bearer bonds (in a general sense analogous to the lease here) issued by the Homeowners Loan Corporation, a federal agency, and guaranteed by the United States. The Bank sued to recover the value of the bonds Parnell had cashed. The Court held that federal law controlled the question whether the bonds were "overdue", because it related to the nature of the rights and duties of the Government. But the Court held also that state law controlled the question whether Parnell had met the burden of proving good faith. "Government securities" generate immediate interests of the Government, but the "present litigation is purely between private persons and does not touch the rights and duties of the United States". The possibility that "the floating of securities of the United States might somehow or other be adversely affected by the local rule of a particular State regarding the liability of a converter

... is far too speculative, far too remote a possibility to justify the application of federal law to transactions essentially of local concern". 352 U.S. at 33. See Wright, Federal Courts, § 60 at 216 (1963). Parnell is clearly contrary to the majority opinion.

Free v. Bland, 1962, 369 U.S. 663, 82 S. Ct. 1089, 8 L. Ed. 2d 180, turned on a specific Treasury regulation designed to make savings bonds attractive to purchasers by a survivorship provision eliminating the necessity for expensive or time-consuming probate proceedings. To allow state law to frustrate this purpose would permit the states to constrict money designed to help the federal treasury borrow money. In line with *Clearfield* and *Parnell*, the Court applied federal law. The Court made the following comment on *Parnell*, a comment appropriate here:

"[T]hat case [*Parnell*] held that, in the absence of any federal law, the application of state law . . . was permissible, because the litigation between the two private parties there did not intrude upon the rights and duties of the United States, the effect on the only possible interest of the United States—the floating of securities—being too speculative to justify the application of federal law."

In *Free v. Bland*, state law conflicted with a distinct federal rule the Treasury had consistently advocated and which supported the paramount interest of the United States.

Although United States was a party in *Clearfield* and its presence in litigation may in some cases be a factor, the principal teaching of *Clearfield*, *Parnell*, and *Free v. Bland*, as a group, is that federal common law is appli-

cable when the state law substantially conflicts with the rights of the United States and where lack of uniformity causes "exceptional uncertainty" in determining the rights and duties of the United States.

Textile Workers Union of America v. Lincoln Mills of Alabama, 1957, 353 U.S. 448, 77 S. Ct. 912, 1 L. Ed. 2d 972, is not cited in the Court's opinion on rehearing but apparently is implicit in the Court's reliance on interstitial law-making. *Lincoln Mills* involved specific performance of an arbitration clause in a labor contract. Under § 301 of the Taft Hartley Act, federal courts have jurisdiction over suits on labor contracts affecting interstate commerce, although there is no specific provision about enforcing arbitration clauses. The Supreme Court held that § 301 was a mandate to fashion and apply a federal common law governing labor contracts. It should be remembered, however, that specific performance of arbitration agreements was prohibited by the law of Alabama, contrary to the strong congressional policy in favor of enforcement of labor arbitration. "To be consistent with that [congressional] policy you need to have specific performance of the arbitration agreement; that would bolster the policy rather than detract from it; so in this area the issue may be federal, that is, subject to federal common law rather than state law if that issue, though not covered squarely or impliedly by any federal statute or any federal treaty or constitutional provision, nevertheless would substantially affect the policy of such federal law." Morgan, *The Future of Federal Common Law*, 17 Ala. L. Rev. 10, 14 (1964). Again, as "Judge Rives [has] pointed out, there was behind *Lincoln Mills* a clear discernible federal policy in favor of collective bargaining

agreements" and also "a huge body of federal labor law on which the courts draw in fashioning a substantive body of labor contract law".¹⁴ This is legitimate "interstitial legislation" because of discernible congressional policy. Dean Cowen, more accurately, calls it a "delegation" by Congress to the Judiciary of a portion of its legislative power.¹⁵ There is of course no federal policy touching resulting and constructive trusts of federal mineral leases; no substantial conflict between the state and federal policies; no clear mandate to fashion a federal substantive law of trusts ex maleficio affecting mineral leases.

The other case the Court relies on is *Francis v. Southern Pacific Co.*, 1948, 333 U.S. 445, 68 S. Ct. 611, 92 L. Ed. 798.¹⁶ But *Francis* lends no support to the majority. In *Francis*, the Supreme Court based its decision on the "accepted and well-settled construction of the Act" that the liability of an interstate carrier to one riding on a free pass was determined not by state law but by the Hepburn Act. This construction has been "unchallenged" in the Supreme Court and "in Congress too". The Transportation Act of 1940 reenacted the free pass provisions "without

¹⁴ Morgan, *The Future of Federal Common Law*, 14 Ala. L. Rev. 10, 31 (1964).

¹⁵ *Id.* at 17.

¹⁶ A note, *The Competence of Federal Courts to Formulate Rules of Decision*, 77 Harv. L. Rev. 1084, 1090 (1964) contracts *Francis v. Southern Pac. Co. with Regents of the Universal System v. Carroll*: "The Supreme Court occasionally has been guilty of failure to inquire into the extent of the interest evinced by a federal statute 'involved' in a litigation. In *Francis v. Southern Pac. Co.*, for example, . . . In contrast with *Francis*, the Court made careful inquiry into the interest evinced by the legislation 'involved' in *Regents of the Univ. Sys. v. Carroll*. There it was held that although the Federal Communications Commission has authority to regulate the transfer of radio licenses, the construction of contracts transferring the control of a station or its property is governed by state law." See also Wright, *Federal Courts* § 60 at 218.

further change or qualification". The Court said, therefore, that it was "not writing on a clean slate"; "the long and well-settled construction of the Act plus reenactment of the free-pass provision without change of the established interpretation" had become "part of the warp and woof of the legislation." "State law which conflicts with this federal rule governing interstate carriers must therefore give way by virtue of the Supremacy Clause".¹⁷

The "presence of a federal statute does not necessarily imply that there is a congressional intent that any particular issue be resolved by reference to federal law".¹⁸ The Federal Communications Act is unquestionably a comprehensive statute regulating a subject of national importance in which the United States has an overriding interest. Just as the Mineral Leasing Act regulates the issuance and transfer of federal mineral leases, the Communication Act regulates the issuance and transfer of radio licenses. *Regents of the University System of Georgia v. Carroll*, 1950, 338 U.S. 586, 70 S. Ct. 370, 94 L. Ed. 363,

¹⁷ 333 U. S. at 450.

¹⁸ Note, The Competence of Federal Courts to Formulate Rules of Decision, 77 Harv. L. Rev. 1084, 1090 (1964). "Although Congress has in rare instances delegated to the judiciary the authority to create a comprehensive body of decisional law in a particular area, the role of the courts is ordinarily interpretative and implemental. The exercise of this judicial competence is premised on the inevitable incompleteness of legislation. A statute may be sufficiently vague that its application to a particular controversy is unclear; it may have omitted ancillary but necessary procedural rules; or it may have created a cause of action whose elements are defined only in general terms, leaving refinements to the judiciary. In these cases it is the task of the judiciary to fill in the legislative lacunae in the manner most compatible with the statutory framework. The scope of judicial lawmaking varies inversely with the clarity of the policies discernible from the statute and its legislative history, but judicial lawmaking competence is properly limited to issues in which the congressional program evinces a legislative interest." Id. at 1089.

concerned the construction of a contract transferring the licensee's control of its radio station to a broadcasting company. When the licensee repudiated the contract, the broadcasting company sued for an accounting. The Court held that state law governed the relationship between the parties as established by the contract between the parties. The Court's reasoning is clearly applicable to the parallel situation the instant case presents:

"Congress has enabled the Commission to regulate the use of broadcasting channels through a licensing power . . . The Commission may impose on an applicant conditions which it must meet before it will be granted a license, but the imposition of the conditions cannot directly affect the applicant's responsibilities to a third party dealing with the applicant . . . We do not read the Communications Act to give authority to the Commission to determine the validity of contracts between licensees and others." 338 U.S. at 600. 602.

Within the scope of its objectives as a mineral leasing law, the Act here is comprehensive and no doubt has many interstices to be filled, in the proper case, by judicial resort to federal common law. But the Act does not purport to go beyond the lessee and lessor. The Secretary, like the Federal Communications Commission, may impose conditions that the lessee must meet, but the Secretary, although interested in disclosure of the nature of the lessee's interest, has not tried to affect the legal relationship of the lessee to third parties. The controversy between the litigants, as it did in *Carroll*, takes place outside the Act, not within an interstice of the Act.

The only case squarely in point is *Blackner v. McDermott*, 10 Cir. 1949, 176 F. 2d 498, which the Court noted as "involving a claim of 'joint venture' highly similar to McKenna's claim here", but declined to follow. The Tenth Circuit applied the law of Wyoming for the reason I would apply the law of Louisiana: the issue was "the relationship of the parties each to the other in respect of the leasehold estate".

Decisions in this circuit in the area of federal decisional law are not distinguished for their consistency.

In *United States v. Sylacauga Properties, Inc.*, 5 Cir., 1963, 323 F. 2d 487, we held that state law was inapplicable in a suit to foreclose an FHA mortgage under the National Housing Act. See also *United States v. Taylor*, 5 Cir. 1964, 333 F. 2d 633, holding that federal law rather than state law applies to the interpretation of a disputes clause in a contract between private parties where there is a sufficient federal interest. The federal interest was in controlling and effecting prompt settlement of disputes between a sub-contractor and a prime contractor engaged in construction work for the Atomic Energy Commission. But see *United States v. Yazell*, 5 Cir. 1964, 334 F. 2d 454, an action to recover on a note for a loan from the Small Business Administration. This Court held, surprisingly, perhaps, that the capacity of a married woman to contract with the federal government is controlled by state law, notwithstanding the effect such a decision might have on the administration of the national program for assistance to small business.

Leiter Minerals, Inc. v. United States, 5 Cir. 1964, 329 F. 2d 85; affirmed subject to abstention, 1957, 352 U.S.

220, 77 S. Ct. 287, 1 L. Ed 2d 267, cannot be reconciled with the majority's holding in the instant case. In 1935, the United States, acting under the Migratory Bird Conservation Act, contracted to purchase almost 9000 acres of land in south Louisiana. The seller reserved the minerals for a ten-year period with provisions for extensions of five years so long as certain minimum use was made of the rights. In Louisiana the sale or reservation of mineral rights establishes only a servitude or right to extract the minerals. Servitudes prescribe in ten years for nonuse, a prescription that cannot be avoided by contract. In 1938, before the conveyance, the Louisiana legislature adopted a statute providing that prescription of mineral rights should not run against the State or United States. This legislation was replaced by Act 315 of 1940 restricting the exemption to the United States. The Louisiana court held that Act 315 would not apply if the deed provided for a mineral servitude for fixed term, but would apply if the term were indefinite. Leiter Minerals, Inc., successor to the seller of the land, filed suit in 1953 to have itself declared owner of the mineral rights. The United States then filed suit to quiet title. This Court, applying state law, held that the reservation was for an indefinite term. Here, therefore, we have the United States a party to the litigation concerning its rights under a contract entered into pursuant to a federal statute. Directly affected are national policies under that statute, policies relating to the conservation of our national resources, and settled policies of federal land acquisition. Presumably the Government paid more to obtain the favorable term. "It seems reasonable to assume a congressional intent that rights for which the Government has paid not be taken away by operation of special state legislation directed against the United States." Note,

78 Harv. L. Rev. 891, 895 (1965). Finally, the case involved state legal concepts exceptionally complex and foreign to common law concepts. I must say, if federal common law applies in the case now before this Court, *Leiter Minerals, Inc.* was an *a fortiori* case for federal common law. This Court held otherwise:

"We have no doubt that the Congress could make federal law applicable, but we are equally clear that it had no intention to do so when it merely authorized the contract by which the United States acquired the property. State law must govern in the absence of a federal statute making federal law applicable . . . [T]he rules of decision act always has had 'application to state laws, strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character.' *Swift v. Tyson*, 1842, 41 U.S. (16 Pet.) 1, 18, 10 L. Ed. 865." *Leiter Minerals, Inc. v. United States*, 5 Cir. 1964, 329 F. 2d 85, at 90.

In sum, I can find no decisional or doctrinal justification for applying judge-made federal common law to a private dog-fight in which the federal government's interest, if any, seems to me to be that of a bored spectator. The speculation that trusts *ex maleficio* are part of the congressional scheme for conserving natural resources hangs by too fine a thread for me to see the connection. Under *Erie* and the Rules of Decision Act, Louisiana may decide for itself whether to preserve its civil law institutions or

adopt alien institutions. The philosophy that brought American federalism into being keeps the national government out of local transactions involving only the determination of the nature of the legal relation of one person to another.

LETTER AGREEMENT BETWEEN WALLIS AND
McKENNA (ORIGINAL PAPERS—ITEM 20.
WALLIS' NOTE OF EVIDENCE)

December 27, 1954

Dear Mr. McKenna:

RE: B L M - A - 0 3 7 4 3 5;
037436; 037437; 0 3 7 4 3 8;
037439.
SOUTHWEST PASS APPLICA-
TIONS

The above captioned serialized numbers represent numbers assigned to oil and gas lease applications made by me (Wallis) to the Bureau of Land Management, Department of the Interior, covering certain lands in Plaquemines Parish, Louisiana. These applications were filed on June 2nd, 1954.

This letter is written to confirm the fact that you have a $\frac{1}{3}$ undivided interest in the above captioned oil and gas lease applications and that your $\frac{1}{3}$ interest, of course, covers such lease or leases as may be issued to me under these captioned applications, it being understood, however, that all dealings in connection with these leases shall be at my sole discretion and direction.

If this correctly represents our understanding in this matter, I will appreciate if you will sign the copy of this letter in the place provided in the lower left corner and return same to me so that I may complete my file herein.

With kindest regards, I remain

Yours sincerely,

s/ Floyd A. Wallis
Floyd A. Wallis

FAW: bb

APPROVED:

s/ P. A. McKenna—1-3-55.

P. A. McKENNA

OPTION AGREEMENT BETWEEN WALLIS AND
PAN AM (ORIGINAL PAPERS—ITEM C., 1, OF
PARAGRAPH I OF THE PAN AM
NOTE OF EVIDENCE)

STATE OF LOUISIANA:
PARISH OF ORLEANS:

THIS AGREEMENT, made this 3 day of March, 1955, by and between FLOYD A. WALLIS, a resident of the Parish of Orleans, State of Louisiana, hereinafter referred to as "Wallis", and STANOLIND OIL AND GAS COMPANY, a Delaware corporation, hereinafter referred to as "Stanolind".¹

¹ Subsequent to the execution of this agreement, the corporate name of "Stanolind" was changed to Pan American Petroleum Corporation.

WITNESSETH, That

"WHEREAS, Wallis has heretofore filed with the United States Department of the Interior, Bureau of Land Management, applications for five (5) non-competitive oil and gas leases on acquired lands, which applications have been assigned the following Bureau of Land Management numbers and cover the following described lands in Plaquemines Parish, Louisiana, to-wit:

B.L.M.-A-037435—[Metes and Bounds Description Omitted] The above parcel of land is estimated to contain an area of 348.80 acres, more or less.

B.L.M.-A-037436—[Metes and Bounds Description Omitted] The above parcel of land is estimated to contain an area of 19.76 acres, more or less.

B.L.M.-A.-037437—[Metes and Bounds Description Omitted] The above parcel of land is estimated to contain an area of 182.63 acres, more or less.

B.L.M.-A.-037438—[Metes and Bounds Description Omitted] The above parcel of land is estimated to contain an area of 221.05 acres, more or less.

B.L.M.-A.-037439—[Metes and Bounds Description Omitted] The above parcel of land is estimated to contain an area of 54.07 acres, more or less.

WHEREAS, Wallis, in consideration of Eight Thousand Three Hundred Dollars (\$8,300.00) cash in hand paid, receipt of which is hereby acknowledged, has agreed to grant to Stanolind an option to acquire from Wallis any and all oil and gas leases which he will acquire in the event the said applications are approved and leases issued in response to such applications.

NOW, THEREFORE, in consideration of the premises, the parties hereto do hereby mutually agree by and between themselves as follows:

I.

Wallis does hereby grant to Stanolind the right and option, at Stanolind's election, to acquire any and all oil and gas leases which may be issued to Wallis, his heirs or assigns, under and by virtue of the above referred to applications.

II.

Wallis agrees to make diligent efforts to acquire leases on, to acquire the right to lease all lands described in the above referred to applications and to obtain the issuance of leases to him covering all of said lands.

III.

Wallis shall notify Stanolind in writing at its office in the Pan American Insurance Building, 2400 Canal Street, New Orleans, Louisiana, when leases have been issued to him under said applications and Stanolind shall, within fifteen (15) days after receipt of such notice, advise Wallis whether or not it elects to acquire such lease or leases from him. If Stanolind notifies Wallis that it does not desire to acquire leases from him or fails to notify Wallis of its election to exercise its option within said fifteen (15) day period, Stanolind's right to acquire leases hereunder shall lapse and there shall be no obligation on Wallis to transfer said leases.

IV.

If Stanolind elects to acquire said leases, Wallis agrees to transfer, within ten (10) days thereafter, to

Stanolind all of his right, title and interest in and to said leases, reserving to himself an overriding royalty interest equal to one-eighth of eight-eighths ($1/8$ of $8/8$) for a consideration which, at the election of Wallis, shall be either (a) Ninety Dollars (\$90.00) per acre for each acre covered by the leases assigned; or (b) the reservation in Wallis of a production payment in the amount of Ninety Dollars (\$90.00) per acre for each acre covered by the leases assigned, payable out of one-thirty-second of eight-eighths ($1/32$ of $8/8$), or (c) a combination of each consideration and production payments out of one-thirty-second of eight-eighths ($1/32$ of $8/8$) at the election of Wallis, which shall total Ninety Dollars (\$90.00) per acre for each acre covered by the leases assigned.

V.

It is understood and agreed that there shall be deducted from the one-eighth of eight-eighths ($1/8$ of $8/8$) overriding royalty reserved by Wallis all overriding royalties, production payments, net profits obligations, carried working interest and other payments out of or with respect to production with which the lease acreage is encumbered over and above the lessor's royalty on the date of the assignment to Stanolind. Wallis agrees that the leases shall not be burdened with such interests over and above the lessor's (United States) royalty in excess of the one-eighth of eight-eighths ($1/8$ of $8/8$) to be reserved by him.

VI.

It is agreed that if assignments of leases are made to Stanolind under this agreement, such assignments shall provide that Stanolind shall have the right and power to pool or combine the acreage covered by the leases or any

portion thereof with other land, lease or leases in the immediate vicinity thereof, in any manner provided by said leases, or by law, and in the event of such pooling, Wallis shall receive in lieu of the overriding royalties specified on production from the unit so pooled only such portion of such overriding royalties as the amount of his acreage placed in the unit or his overriding royalty interest thereon on an acreage basis bears to the total acreage so pooled in the particular unit involved.

VII.

The terms, covenants and conditions of the agreement shall be binding and shall inure to the benefit of the parties hereto, the successors and assigns of Stanolind, and the heirs, executors, administrators, personal representatives and assigns of Wallis.

THUS DONE AND SIGNED by the parties hereto in the presence of the undersigned competent witnesses on the day and date first above written.

WITNESSES:

John L. Lipa

Edwin A. Ellingshausen, Jr.

Floyd A. Wallis

STANOLIND OIL AND
GAS COMPANY

W. P. Boles

W. C. Imbt

Joan Vehalage

By

STATE OF LOUISIANA:
PARISH OF ORLEANS:

Before me, the undersigned Notary Public, on this day personally appeared John L. Lippa, who, being by me duly sworn, stated under oath that he was one of the subscribing witnesses to the foregoing instrument and that the same was signed by FLOYD A. WALLIS in his presence and in the presence of Edwin A. Ellinghausen, Jr., the other subscribing witness.

Sworn to and subscribed
before me this 4th
day of March, 1955.

Henry G. Neyrey, Jr.,

Notary Public

John L. Lippa

STATE OF TEXAS:
COUNTY OF HARRIS:

On this 15 day of March, 1955, before me appeared W. C. Imbt, to me personally known, who, being by me duly sworn, did say that he is the Attorney-in-Fact for STANOLIND OIL AND GAS COMPANY, and that the foregoing instrument was signed in behalf of said corporation by authority of its Board of Directors, and said W. C. Imbt acknowledged said instrument to be the free act and deed of said corporation.

Gertrude Oliver

Notary Public

GERTRUDE OLIVER

Notary Public in and for Harris County,
Texas

INDEX

	Page
STATEMENT OF CASE	2
WALLIS' REASONS FOR ALLOWANCE OF WRIT	4
Wallis' Reason I—Pages 18-22	5
Wallis' Reason II—Pages 22-32	6
Wallis' Reason III—Pages 32-63	7
Pages 33-40	7
Pages 40-48	9
Pages 49-59	10
Pages 59-63	12
Wallis' Reason IV—Pages 63-76	12
CONCLUSION	13

TABLE OF CASES

<i>Black v. Elkhorn Mining Co.</i> , 163 U.S. 445 (1896)	8
<i>Black v. Jackson</i> , 177 U.S. 349 (1899)	8
<i>Blackner v. McDermott</i> , 176 F. 2d 498 (10th Cir. 1949)	10
<i>Boesche v. Udall</i> , 373 U.S. 472 (1962)	7, 12, 14
<i>Ducie v. Ford</i> , 138 U.S. 587 (1890)	8
<i>Forbes v. Gracey</i> , 94 U.S. 762 (1876)	8
<i>Gauthier v. Morrison</i> , 232 U.S. 452 (1913)	7
<i>Hodgson v. Federal Oil & Development Co.</i> , 274 U.S. 15 (1927)	10
<i>Johnson v. Towsley</i> , 80 U.S. 72 (1871)	9
<i>Lytle v. Arkansas</i> , 63 U.S. (22 How.) 193 (1859)	8
<i>Marquez v. Frisbie</i> , 101 U.S. 473 (1879)	8
<i>Pan American Petroleum Corporation v. Pierson</i> , 284 F. 2d 649 (10th Cir. 1960)	11
<i>United States v. Buchanan</i> , 232 U.S. 72 (1913)	7
<i>Witbeck v. Hardeman</i> , 51 F. 2d 450 (5th Cir. 1931) ...	11



IN THE
Supreme Court of the United States
OCTOBER TERM, 1965

No. 341

FLOYD A. WALLIS, *Petitioner,*

v.

PAN AMERICAN PETROLEUM CORPORATION, *Respondent.*

FLOYD A. WALLIS, *Petitioner,*

v.

PATRICK A. McKENNA, *Respondent.*

On Petition For A Writ Of Certiorari To The United States
Court Of Appeals For The Fifth Circuit

**BRIEF FOR PATRICK A. McKENNA, RESPONDENT,
IN OPPOSITION**

Floyd A. Wallis has petitioned for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in the subject case.

In support of his petition, Wallis has written extensively. He has ranged far and wide in attempting to develop reasons for granting the writ. McKenna hopes to show this Court, directly and concisely, the fallacies of those reasons.

STATEMENT OF THE CASE

McKenna's version of the facts, naturally enough, disagrees with Wallis'. For the purposes here, however, this is unimportant. So rather than restate the chronology of events which culminated in the filing of a law suit against Wallis, McKenna will confine his statement to the following.

Wallis' experience in federal leasing was limited when he contacted McKenna in early 1954. (R. 1249-1251) McKenna's experience, on the other hand, had been considerable. (R. 1448-1449, 1755) An agreement was reached, involving a certain tract of federal land in Plaquemines Parish, Louisiana, which provided that (a) the so-called acquired lands applications for leasing would be filed if everything checked out satisfactorily to McKenna (R. 1772-1773), (b) McKenna was to own a one-third undivided interest therein and in any lease or leases to be issued thereunder, (c) McKenna and Wallis were to share in the expenses thereof, (d) McKenna was to supervise the joint effort in Washington, D. C. and advise Wallis what to do in New Orleans and (e) Wallis was to supervise the joint effort in New Orleans and was to have the discretion and direction with respect to trades respecting the lease or leases. The acquired lands applications were filed in June of 1954 in the name of Wallis. McKenna's one-third undivided interest was confirmed by Wallis' letter of December 27, 1954, a copy of which

is included on pages 159 and 160 of Wallis' petition. Each party paid one-half of the filing fees and advanced rentals in connection with the filing. (R. 14-17, 257-258)

McKenna and Wallis jointly undertook to obtain the federal lease which is evidenced by the facts of the case and by the correspondence between the parties during 1954, 1955 and 1956. In the meantime, however, Wallis secretly negotiated on March 3, 1955 an option with Pan American Petroleum Corporation respecting the acquired lands applications and collected, as part payment therefor, \$8,300, a copy of which option is included on pages 161 through 165 of Wallis' petition. Not until March of 1959, four years later, was McKenna first advised of the option and then not by Wallis but by a representative of Pan American. (R. 333-335, 1351-1354, 1816-1822)

As the acquired lands applications were being processed through the Department of the Interior, both parties decided to and did file the so-called public domain application in the name of Wallis on March 8, 1956. A copy of this application bearing Wallis' signature and the Bureau of Land Management's stamped receipt and serial number was forwarded to McKenna on the day of its filing by Harry Edelstein who had been retained by both parties and who had prepared and filed the application. (R. 306, 1796-1797). Both the acquired lands applications and the public domain application covered the identical lands (R. 1252-1253).

Wallis fully admits (1) he did agree to pay one-half of the legal fees of Mastin White, who was retained in early 1955 to represent his and McKenna's interest before the Department of the Interior, which he did not pay (R. 1307), (2) he did agree to pay one-half of the

legal fees of Harry Edelstein, who succeeded Mastin White in November 1955, which he did pay (R. 1322-1323), (3) McKenna paid all of White's fees and one-half of Edelstein's fees for services rendered through March 1956 and until Wallis refused in late April 1956 to continue their joint venture. (R. 1322-1323, 1331-1336) In his letter to McKenna of May 4, 1956, attempting to justify his action, Wallis further confirmed in writing McKenna's interest in the lands in question and in a lease or leases thereon when he wrote:

"... I agreed with you that you were to have a one-third interest in any lease or leases issued to me by the Bureau of Land Management covering these lands ..."

A public domain lease was issued to Wallis in December 1958 and when he refused to honor his agreement as to McKenna's one-third interest therein, suit was instituted in March 1959 before the United States District Court for the Eastern District of Louisiana. The trial court applied its view of the law of Louisiana, confining McKenna's interest to the acquired lands applications, although all applications related to the same tract of lands. With one judge dissenting, the Court of Appeals reversed and remanded, holding that federal law should govern the case.

WALLIS' REASONS FOR ALLOWANCE OF WRIT

McKenna will comment on Wallis' reasons, and his arguments in support thereof, in the same sequence as they appear in his petition beginning on page 18. He will not attempt, however, to pin down for its true significance, or more appropriately its lack thereof, each of the many cases Wallis cites or each of the many thrusts he tries to argue. Instead, McKenna

will attempt to distill from the petition, as best he can under the circumstances of Wallis' presentation, its underpinning, hoping to expose the fragility thereof.

Wallis' Reason I—Pages 18-22

Wallis states on page 19 that "the decision by this Court in the *Boesche* case, as that decision has been interpreted and applied by the Court below, we submit, will have far-reaching effect, and, will necessarily result in 'clouding,' and rendering questionable, the titles to all such outstanding leases." He thus flatly asserts that 139,000 leases which were outstanding as of June 30, 1960 under the Mineral Leasing Act of 1920 and 159,000 leases under all leasing programs are now in jeopardy; indeed a dramatic, almost catastrophic, consequence in the oil and gas industry. But there we are left suspended with a naked conclusion beyond which he says little except an unsupported assertion respecting what is termed to be the consistent holdings of "the Land Department and the decisions heretofore rendered by this Court and the Circuit Courts involving the interpretation of the Mineral Leasing Act of 1920." Nor does he even broadly indicate in what way such may be the consequence, how and why.

Certainly, if the foregoing were to be the almost cataclysmic reach of the Fifth Circuit's opinion, one wonders why Wallis failed to develop his theory somewhat beyond the point where he states his conclusion and then drops it in the reader's lap; why he failed to clothe it with some indicia of substance. McKenna submits this Wallis cannot do and that his tocsin is no more than the sound of nothingness.

Wallis' Reason II—Pages 22-32

The lack of merit in Wallis' argument on these pages is manifest in his statement on page 23 of his petition that the proviso in § 32 of the Leasing Act "entirely precludes the conclusion of the second opinion" which he caps even further when he asserts on page 26 that the proviso "unqualifiedly precludes" the application of federal law. It is Wallis' view, as he expresses it on page 29, that the proviso "so clearly demonstrates the error of the majority below, that this Court would be justified in granting this petition, and, *immediately reversing the decision below without further proceedings.*" (Emphasis Wallis').

And what is the language of the proviso which Wallis argues as so clearly dispositive of the question? It is that nothing in the Leasing Act "shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States." From this we are advised by Wallis that the "rights of the States" include the "exercise" of a right by a State to determine what law is to govern in a suit filed in a federal court. The absurdity of such a proposition is patent and requires no further comment. And it becomes even more so if such a "right" is attributed to some "other local authority."

The cases cited by Wallis as supporting his view of the § 32 proviso are so clearly inapposite to his contentions with respect thereto that it is difficult to understand any justification for their inclusion.

Wallis' Reason III—Pages 32-63

Wallis' underlying contention on these pages is that "it is apparent that the second decision utilized the *Boesche* case as a vehicle for avoiding the force and effect of decisions relating to Public Land Laws, generally." He then examines these decisions, dividing them into categories A (pages 33-40), B (pages 40-48) and C (pages 49-59). But as a reading of each will show, there is nothing in their so-called "force and effect" which the Fifth Circuit had to avoid in deciding the case below.

Pages 33-40

Wallis' first category of cases is examined under the caption, "The Decisions Relating To The Public Land Laws As Respects The Nature Of Inceptive Rights While The Legal Title Remains In The United States."

United States v. Buchanan, 232 U.S. 72 (1913), cited by Wallis on page 35, related to an effort to predicate a criminal indictment upon a federal statute which by its own terms was inapplicable once lands had been entered upon by a homesteader. In *Gauthier v. Morrison*, 232 U.S. 452 (1913), as shown in the very quotation from the opinion Wallis himself includes on pages 36 and 37, the Court specifically pointed out that under the homestead laws in force at that time Congress had "pursued the policy of permitting [possessory actions] to be dealt with in the local tribunals according to local modes of procedures." The situation in each was thus far removed from where the Congress, in the words of *Boesche v. Udall*, 373 U.S. 472, 477-478 (1962), "under the Mineral Leasing Act has not only reserved to the United States the fee interest in the leased land, but has also subjected the lease to exact-

ing restrictions and continuing supervision by the Secretary [of the Interior].”

Wallis on pages 37 and 38 refers to *Lytle v. Arkansas*, 63 U.S. (22 How.) 193 (1859) and *Black v. Jackson*, 177 U.S. 349 (1899). The point he intends to establish in citing *Lytle* is not clear. As to *Black*, it should be noted that the questions involved the remedy of injunction against an alleged squatter and his right to trial by jury. The choice of which substantive law to apply was not presented.

There is nothing in the opinion extract from *Marquez v. Frisbie*, 101 U.S. 473 (1879), which Wallis cites on page 38, to indicate one way or another whether local or federal substantive law was to be applied by the courts referred to therein.

The only point Wallis apparently suggests on pages 38 and 39 is that *Forbes v. Gracey*, 94 U.S. 762 (1876), cannot be reconciled with *Black v. Elkhorn Mining Co.*, 163 U.S. 445 (1896). The cases are, however, reconcilable but we see no purpose in burdening this opposition further with respect thereto except to point out that, in both, statutes of Congress clearly governed the disposition of each.

In *Ducie v. Ford*, 138 U.S. 587 (1890), cited by Wallis on pages 39 and 40, the only issue before the Court was whether the alleged facts were sufficient to take the case out of the Montana statute of frauds. The question of whether federal law should instead apply was not raised. Even if it had, however, it should be noted that the result would have been no different since, unlike the law of Louisiana as applied by the trial court in the case at bar, the law governing

the application of the Montana statute of frauds was similar to that generally followed in the other jurisdictions. (138 U.S. at 592).

Pages 40-48

Wallis' second category of cases are included under the caption, "Decisions Relating To The Public Land Laws As Respects The Equitable Power Of The Courts And The Appliation Of Federal Law."

Wallis appears to ignore the context when on page 41 he refers to, and quotes from, *Johnson v. Towsley*, 80 U.S. 72, 85 (1871). The context of the quotation he uses involves the situation where in a contested proceeding the Interior Department has issued a federal land patent to one of the adverse parties and the question whether under such circumstances a court should have jurisdiction to determine if "in equity and good conscience, and by the laws Congress has made on the subject, it ought to go to another." The Court answered the question affirmatively, taking the view which is, and has been long, universally recognized. There is nothing whatever in this well-known concept which even remotely supports Wallis' contentions as to the showing McKenna must make, as he states it in the first incomplete paragraph appearing on page 42 of his petition.

The thrust of Wallis' arguments on pages 42 through 48, which springs generally from his view of *Johnson v. Towsley*, is so clearly not pertinent to the case at bar that McKenna sees no reason to trace, in rebuttal, the many turns it takes which eventually leads to nowhere.

Pages 49-59

On these pages Wallis cites cases of his third category which he calls, "Decisions Relating To And Interpreting The Mineral Leasing Act, Are Contrary To The Decision Below."

He leads off with *Hodgson v. Federal Oil & Development Co.*, 274 U.S. 15 (1927). After conceding on page 52 that the Court applied federal law "to the extent permissible," Wallis goes on to state that the Court also applied the Wyoming law of co-tenancy. But the Court simply held, saying nothing about Wyoming law, that there was a failure "to allege definite facts (not mere conclusions) sufficient to show some fiduciary relationship" between the parties "unless such a relationship necessarily arose because of a co-tenancy." (274 U.S. at 19). The Court then stated the general law relating to co-tenancy, as well as the exception thereto, citing cases from other jurisdictions in support thereof and noting thereafter that there was "no opinion by the courts of Wyoming to the contrary." McKenna suggests that if the Court were, in fact, applying Wyoming law, it would have said so positively and not have approached the application thereof negatively.

Turning to *Blackner v. McDermott*, 176 F. 2d 498 (10th Cir. 1949), which Wallis cites on page 56, it should be noted that no state statute was interposed to defeat a joint venture. Accordingly, there was never any issue raised by the parties as to which law applied. In the absence thereof, the Court simply applied the common law of Wyoming in sustaining the joint venture.

On page 57, Wallis states, in connection with the cases he cites under his third category, that "these cases

treat the holders of such 'rights' as being *entirely* analogous to those who hold such 'inceptive rights' under the Public Land Laws, where the 'legal title' is vested in the United States." (Emphasis supplied). Only two cases cited by Wallis under his third category bear directly on this principle he is attempting to assert. One is *Witbeck v. Harde nan*, 51 F. 2d 450 (5th Cir. 1931), and the other is *Pan American Petroleum Corporation v. Pierson*, 284 F. 2d 649 (10th Cir. 1960).

As to the appropriateness, or lack thereof, respecting the citation of *Witbeck*, one needs only to refer to the extract Wallis uses on page 55 of his petition and to restore it to the context in which it appears on page 452 of 51 F. 2d, as follows:

"... The reason is that in such cases the courts refuse to interfere until the Land Department has done its work and issued a final patent, thus ending the proprietary interest of the United States in the land and making the contest over it a matter of private interest only . . . Under the Leasing Act the land of the United States is not to be conveyed by patent, but leased, so that the proprietary interest of the United States in the land never ceases. Nevertheless, the lease is the final action of the Land Department in disposing of the land, and in this respect is analogous to a patent . . ."

Similarly in *Pan American*, one needs only to read the extract therefrom set forth in the footnote on page 57 of Wallis' petition, adding this language from the opinion which immediately follows at pages 654 and 655 of 284 F. 2d, "Upon the performance of this last act, administrative power to annul or cancel ends and

judicial power begins.”* In other words, Wallis to the contrary notwithstanding, the only analogy the Court in each case draws relates to the point at which a court will interfere to review a grant by the government of either a land patent or a mineral lease.

Pages 59-63

Wallis in concluding his argument under his third major reason for allowing the writ, states on page 63 that, “We submit that the *Boesche* case did not render inapplicable to the ‘rights’ of a lessee, the decisions relative to inceptive ‘rights’ under the Public Lands Laws, generally, nor did it intend to relegate such ‘rights’ of a lessee to any inferior or different status.”

Since the foregoing is Wallis’ argument at this point, McKenna sees no need to comment further on ground that has already been covered and on the *Boesche* case which speaks clearly for itself, as do the opinions of the Court of Appeals below, except to point out again that the premise, which Wallis says “the *Boesche* case did not render inapplicable,” lacks totally in merit as such premise may relate to the case at bar.

Wallis’ Reason IV—Pages 63-76

At the conclusion of his petition, beginning on page 73, Wallis argues his views on options, a question more directly affecting Pan American Petroleum Corporation in its suit against Wallis. As to the preceding pages under this final reason for allowing the writ, a brief comment appears to be appropriate as regards

* This Court in *Boesche v. Udall*, 373 U.S. 472 (1962) refused to agree with the principle stated in this case that once a federal oil and gas lease had been issued the Secretary of the Interior was without statutory authority to annul or cancel the lease because of events preceding the issuance of the lease.

Wallis' assertion on page 67 in connection with the opinions of the Court below that, "Here then is the clear intent of Congress that § 30 of the Act does not apply to the lease here involved, in light of § 30(a), yet the opinions below relied, in the main, upon the erroneous assumption that § 30 applied, and the fact that an 'assignment' of a lease 'must be approved by . . . the Secretary.' " The best evidence of this contention's total invalidity can incontrovertibly be seen in what the Court below actually said, as set forth on page 135 of the petition:

" . . . Furthermore, assignments or subleases of all or part of the acreage included in an oil or gas lease must be approved by the Secretary. See *Boesche v. Udall*, 1962, 373 U.S. 472; 30 U.S.C.A. § 187a [§ 30(a)]. The Secretary is required to disapprove the 'assignment' or 'sublease' only for lack of qualification under the Act or for lack of sufficient bond. See 30 U.S.C.A. § 187a [§ 30(a)]. Nowhere in the Mineral Leasing Act of 1920 are the terms 'assignment' and 'option' defined.

"The posture of the instant case is interstitial. The Secretary has granted a lease to Wallis. We deal with claims that are, in essence, an alleged 'option' and an alleged 'assignment' but which, ultimately, must be approved or registered with the Secretary . . ."

Yet Wallis insists the opinions relied on § 30, although the Court cites § 30(a).

CONCLUSION

The Fifth Circuit correctly disposed of the case at bar in its opinions below. Even following the issuance of a federal oil and gas lease, the Congress "has not only reserved to the United States the fee interest in

the leased land, but has also subjected the lease to exacting restrictions and continuing supervision by the Secretary." (373 U.S. at 477-478). Any assignee of the lease, whether in whole or in part, necessarily takes an interest in the federal public domain and becomes subject to the foregoing "exacting restrictions and continuing supervision." The scheme of federal oil and gas leasing is entirely federal in scope and can in no way tolerate the interdiction by state law as to who can or cannot, or who may or may not qualify to, participate in an interest in the leasehold.

The opinions of the Fifth Circuit set forth the basis upon which it must necessarily follow that only federal law must apply to the case at bar.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

E. L. BRUNINI
First National Bank Building
Jackson, Mississippi 39205
Attorney for
Patrick A. McKenna



FILE COPY

No. 341

Office-Supreme Court, U.S.
FILED

AUG 30 1965

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

FLOYD A. WALLIS,

Petitioner,

versus

PAN AMERICAN PETROLEUM CORPORATION,

Respondent.

FLOYD A. WALLIS,

Petitioner,

versus

PATRICK A. McKENNA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF FOR PAN AMERICAN PETROLEUM CORPORATION IN OPPOSITION

FLOYD J. COBB
MORRIS WRIGHT
METTERTY I. SHERRY, JR.
802 Whitney Building
New Orleans, Louisiana

WILLIAM P. HARDEMAN
PERCY SANDEL
1916 St. Charles Avenue
New Orleans, Louisiana

Attorneys for Respondent,
Pan American Petroleum
Corporation

INDEX

	Page
STATEMENT OF CASE	3
THE MINERAL LEASING ACT FOR PUBLIC DOMAIN LAND	7
APPLICABILITY OF FEDERAL LAW AS AF- FECTING OUTSTANDING FEDERAL LEASES	12
BOESCHE V. UDALL	12
UNIFORMITY	16
CONCLUSION	23

TABLE OF CASES

Akin v. Louisiana National Bank of Baton Rouge, 322 F. 2d 749 (1963)	22
American Pipe & Steel Company v. Firestone Tire & Rubber Company, 149 F. 2d 872 (1945)	10
Bank of America National Trust & Savings Ass'n. v. Parnell, 352 U. S. 29 (1956)	9
Boesche v. Udall, 373 U. S. 472 (1963)	12, 13, 14, 20
Camfield v. United States, 167 U. S. 518 (1897)	12
Clearfield Trust Company v. United States, 318 U. S. 363 (1943)	2, 9, 16
Erie R. Company v. Tompkins, 304 U. S. 64 (1938)	2, 8, 15
Francis v. Southern Pacific Company, 333 U. S. 445 (1947)	9

II

TABLE OF CASES (Continued)

	Page
Fort Leavenworth R. R. v. Lowe, 114 U. S. 525 (1885)	11
Hodgson v. Federal Oil and Development Com- pany, 274 U. S. 15 (1927)	16, 17
Hood v. McGehee, 237 U. S. 611 (1915)	21
Hunt v. United States, 278 U. S. 96 (1928)	12
Irvine v. Marshall, et al, 61 U. S. (20 How.) 558 (1858)	19
Levitt v. Johnson, 334 F. 2d 815 (1964)	10
McCullough v. Maryland, 4 Wheat 316 (1819)	11
McKelvey v. United States, 260 U. S. 353 (1922)	12
Massie v. Watts, 6 Cranch 148 (1810)	6, 18, 20
Morgan v. Udall, 113 U. S. Appl. D. C. 192, 306 F. 2d 799 (1962), cert. den'd 371 U. S. 941	5
National Metropolitan Bank v. United States, 323 U. S. 454 (1944)	9
Ohio v. Thomas, 173 U. S. 276 (1899)	12
Pan American Petroleum Corporation v. Pierson, 284 F. 2d 649 (1960)	13, 20
Pan American Petroleum Corporation v. Wallis, 344 F. 2d 432 (1965)	2, 9, 20, 21
Paul v. United States, 371 U. S. 245 (1963)	11
Royal Indemnity Company v. United States, 313 U. S. 389 (1941)	9
Sola Electric Company v. Jefferson Electric Com- pany, 317 U. S. 173 (1942)	9, 15

III

TABLE OF CASES (Continued)

	Page
Southern Pacific Company v. Jenson, 244 U. S. 205 (1917)	16
State of Louisiana v. Floyd A. Wallis, et al, E. D. La. Civil Action No. 9046	4
Textile Workers Union of America v. Lincoln Mills of Alabama, 353 U. S. 448 (1957)	2, 9
Udall v. Tallman, 13 L.ed 616 (1965)	14
United States v. 93.970 Acres of Land, 360 U. S. 328 (1959)	10
United States v. Standard Oil Company, 332 U. S. 301 (1947)	9, 15
United States v. Taylor, 333 F. 2d 633 (1964)	10
Utah Power & Light Company v. United States, 243 U. S. 389 (1917)	11
Witbeck v. Hardeman, 51 F. 2d 450 (1931)	13
Wilson v. Cook, 327 U. S. 474 (1945)	11

STATUTES

Mineral Leasing Act of 1920; Act of February 25, 1920; 41 Stat. 437; 30 U. S. C. 181 et seq	7
Section 30; 30 U. S. C. 187	9
Section 32; 30 U. S. C. 189	3, 6, 8, 11, 12
U. S. Constitution:	
Article I, Section 8, Clause 17	11

IV
TABLE OF CASES (Continued)

Page

MISCELLANEOUS

20 Am. Jur. 2d, Courts § 208 at 543	10
I A Moore, Federal Practice 0.305 (3) at 3045, 3053 and 0.324 at 3759 (2d ed. 1961)	10
Clark, State Law in the Federal Courts: The Brooding Omnipresence of <i>Erie v. Tompkins</i> , 55 Yale L.J. 267 at 284, 285 (1946)	10
Exceptions to <i>Erie v. Tompkins</i> : The survival of Federal Common Law, 59 Harv. L. Rev. 966 (1946)	10
Federal Courts — Rules of Decision, 50 Va. L. Rev. 1236 (1964)	10
Friendly, in Praise of <i>Erie</i> — And of the new Fed- eral Common Law, 39 N.Y.U.L. Rev. 383, 422 (1964)	10
Hart, The Relations Between State and Federal Law, 54 Colum. L. Rev. 489, 509-15, 525-35 (1954)	10
Luke 16:13	18
Matthew 6:24	18
Mishkin, The Variousness of Federal Law: Competence and Discretion in the choice of Na- tional and State Rules for Decision, 105 U. Pa. L. Rev. 797 (1957)	10, 11
Wright, Federal Courts, § 60 at 213 (1963)	10

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1965

No. 341

FLOYD A. WALLIS,
Petitioner,

versus

PAN AMERICAN PETROLEUM CORPORATION,
Respondent.

FLOYD A. WALLIS,
Petitioner,

versus

PATRICK A. McKENNA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

BRIEF FOR PAN AMERICAN PETROLEUM
CORPORATION IN OPPOSITION

The Opinion of the United States Court of Appeals for the Fifth Circuit which Petitioner, Floyd A. Wallis, seeks to have reviewed holds that federal law, rather than the law of the State of Louisiana, is applicable herein. *Pan American Petroleum Corporation v. Wallis* reported at 344 F. 2d 432.

The dissenting opinion concedes the right of federal courts to fashion federal common law:

"I do not say that the Court's decision is likely to start dangerous temblors in American federalism. It has always been in the cards that federal common law would expand as the activities of the national government expanded. For many years, before *Erie*, the federal 'judge followed his own nose'; he 'sat down and looked up what relevant federal law there might be in the cases and otherwise decided what the law ought to be * * * though in some instances the judge might consider relevant state decisions'. Moreover, I agree with Judge Henry Friendly's summary of the development, since *Erie*, of the 'new' federal common law: 'We may not have achieved the best of all possible worlds with respect to the relationship between state and federal law. But the combination of *Erie* with *Clearfield* (*Clearfield Trust Co. v. United States*, 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838) and *Lincoln Mills* (*Textile Workers of America v. Lincoln Mills of Alabama*, 353 U.S. 448, 77 S. Ct. 912, 1 L.Ed. 2d 972) has brought us to a far, far better one than we have ever known before.' " (344 F. 2d 442).

Petitioner urges the granting of the petition for a writ of certiorari because the Mineral Leasing Act of 1920, particularly Section 32, "unqualifiedly precludes" (Page 26 of Petitioner's application for review) the application of federal law and "so clearly demonstrates the error of the majority below, that this Court would be justified in granting this petition, and, *immediately reversing the decision below without further proceedings.*" (Emphasis Petitioner's at page 29).

The Opinion of the Fifth Circuit is eminently correct. It succinctly delineates the standards to be followed as announced in repeated decisions of this Court governing the application of federal law in a diversity action. The Opinion stands firm against the challenge by Petitioner which is totally without merit. The rule set forth by the majority creates no imbalance in the scale between federal and state relationships.

STATEMENT OF THE CASE

The suit of Respondent, Pan American Petroleum Corporation, prayed for specific performance of Wallis's obligations under an Option Agreement dated March 3, 1955, which covered five numbered "acquired lands" applications and contained a provision obligating Petitioner "to make diligent efforts to acquire leases on all lands described in the above referred to applications and to obtain the issuance of leases to him covering all of said lands."¹

Without Respondent's knowledge, Petitioner filed a

¹The acreage affected was approximately 826.87 acres at the Southwest Pass of the Mississippi River near Burwood, Louisiana.

"public domain" application which resulted in the issuance of the federal lease in controversy which is dated December 19, 1958, effective as of January 1, 1959,² and the pending "acquired lands" applications covered by the Option Agreement were nullified accordingly.

It is admitted by Petitioner that the same land was embraced by both the "acquired lands" and "public domain" applications. However, in filing the "public domain" application, Petitioner corrected errors of description in the original "acquired lands" offers pointed out to him by his Washington attorney. Such errors came to Petitioner's knowledge during the handling of the "acquired lands" offers admittedly covered by the Option Agreement. Contemporaneously with the surreptitious filing of the "public domain" application for his own benefit, Petitioner filed also, surreptitiously, a new "acquired lands" application in the name of his brother-in-law, T. Miller Gordon, employing therein the new and corrected description. Petitioner has admitted that Respondent had left

²Shortly after the issuance of the lease to Wallis, he applied for a permit to drill and staked a well location on the lease. He was prevented from operating by action of the State of Louisiana which sought an injunction in the State court. This action was transferred to the United States District Court for the Eastern District of Louisiana. (*State of Louisiana v. Floyd A. Wallis, et al*, E.D. La. Civil Action No. 9046). The California Company and Shell Oil Company, who own leases from the State of Louisiana covering the Wallis lease lands, and Pan American made appearances in the suit. At the suggestion of the court, Wallis, the lessee of the United States, Shell and California, the lessees of the State of Louisiana, and Pan American entered into an operating agreement without prejudice to the respective claims of the parties. The disputed property was developed and is now being operated thereunder by Shell Oil Company, the designated Operator, for the parties ultimately determined to be the owners. The suit of the State of Louisiana was dismissed.

the handling of the "acquired lands" applications to his discretion and has admitted also that he never disclosed to Respondent at any time the filing of the "public lands" offer which he now claims he had the right to prosecute and did prosecute solely for his personal profit notwithstanding (a) his obligation in the Option Agreement to make diligent efforts "to obtain the issuance of leases to him covering all of said lands", and (b) his moral, ethical and legal obligation not to act for his own account in conflict with his contractual and fiduciary obligations under the Option Agreement.

The so-called participation of Mr. Neil Stull, Pan American's Washington attorney, referred to on page 10 of Petitioner's application terminated in August, 1955 and neither Stull nor Respondent knew of the filing of the public domain offer on March 8, 1956 until after issuance of the lease on December 19, 1958.

On the basis of information that the Department of the Interior might consider the land as "public domain" instead of "acquired", Wallis filed the new application with the improved and corrected description which effectively overcame the errors discovered in the original "acquired lands" offers. Petitioner subsequently prevailed in proceedings in the Department of the Interior and in the Courts as against other applicants seeking the federal lease. *Morgan v. Udall*, 113 U.S. Appl. D.C. 192, 306 F. 2d 799 (1962), cert. den'd 371 U.S. 941.

During the period Petitioner was prosecuting fur-
tively "his" "public lands" offer which he testified was "none of Pan American's business", Petitioner badgered Pan American's representatives for financial assistance to meet what he said were heavy expenses

incidental to obtaining "a lease", but without saying it would be "his" lease.

Petitioner, upon the issuance of the public lands lease BLM 042017, took the position that the Option covered only leases issued in direct response to the acquired lands applications specifically referred to in the Option Agreement and, for that reason, refused to assign BLM 042017 to Respondent.

Respondent on April 13, 1959, filed in the United States District Court, for the Eastern District of Louisiana, this suit for specific performance.

On December 28, 1961, the District Judge decided "nor does it matter whether Wallis obtained his lease by breaching his trust, as alleged" and "In effect, Wallis had two irons in the same fire, in only one of which McKenna and Pan American held an interest," and further, the lease "is the fruit of a different venture based on a new theory".³

In the original opinion of the Fifth Circuit, the Court held that "the district court committed fundamental error in applying Louisiana statutes and law to determine rights in a lease on public domain land which were and are subject only to the sovereignty of the United States" and "the doctrine of resulting trusts . . . may have application to the facts of this case." This

³The record in this case demonstrates beyond argument that Petitioner breached his trust and fiduciary obligations to Pan American. The opinion of the Fifth Circuit underscored the holding in *Massie v. Watts*, 6 Cranch 148 (1810), that "According to the clearest and best established principles of equity, the agent who so acts becomes a trustee for his principal. He cannot hold the land under an entry for himself, otherwise than a trustee for his principal." (Emphasis by Fifth Circuit Court of Appeals).

opinion was confirmed by the majority on rehearing and the judgment of the District Court was vacated and the cause remanded for re-trial upon the evidence already taken and any additional relevant evidence, and for full and complete findings of fact and conclusions of law on all issues under the applicable principles of federal law.

Simply stated, the sole issue posed is whether the Fifth Circuit Court of Appeals is correct in holding that the federal government has an interest herein arising out of federal statutes affecting a federal mineral lease on public domain land requiring the application of federal law.⁴

THE MINERAL LEASING ACT FOR PUBLIC DOMAIN LAND⁵

The majority opinion specifically stated:

“The law applied should be keyed to the nature of the issue before the court; if nonfederal, state substantive law should be applied; if a federal matter is before the court, federal law should be applied.”

“ * * * federal issues in such cases will be decided by reference to federal law.”

⁴The Court below held that “there is sufficient federal interest for the substantive independence of the federal court in determining the claims of McKenna and Pan American”.

⁵Act of February 25, 1920; Mineral Leasing Act of 1920; 41 Stat. 437; 30 U.S.C. 181 et seq.

"The 'Erie doctrine' does not annul the federal courts' responsibility to develop federal common law in aid of the uniform implementation and protection of federal interests."

Petitioner contends that the second opinion of the majority is erroneous in holding that federal law is applicable herein. Petitioner relies on Section 32 of the Mineral Leasing Act⁶ and contends that the Court referred to only a portion of Section 32 and did not give the Section full effect. Section 32 reads:

"The Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and do any and all things necessary to carry out and accomplish the purposes of sections 181-194, 201, 202-208, 211-214, 223-229, 241, 251, and 261-263 of this title, also to fix and determine the boundary lines of any structure, or oil or gas field, for the purposes thereof. Nothing in said sections shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States. February 25, 1920, c. 85, § 32, 41 Stat. 450".

The language of Section 32 that "Nothing in said sections shall be construed or held to affect the rights of the States . . . to exercise any rights which they may have" does not preclude the "federal courts' respon-

⁶30 U.S.C. 189.

sibility to develop federal common law in aid of the uniform implementation and protection of federal interests." This provision which Petitioner relies upon did not CREATE any rights in favor of the states. It did not RECOGNIZE any rights of the states. It specifically referred only to such "rights" which the states "may have". Further the language of Section 30 of the Mineral Leasing Act⁷ "That none of such provisions shall be in conflict with the laws of the State in which the leased property is situated" simply has reference to the provisions or stipulations of federal leases and does not annul "federal responsibility" which is of concern herein. It is well established that a federal court can fashion federal common law when the rights, interests, duties or substantive policies of the United States are directly affected.⁸ *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943); *Francis v. Southern Pacific Co.*, 333 U.S. 445 (1947); *Royal Indemnity Co. v. United States*, 313 U.S. 389 (1941); *National Metropolitan Bank v. United States*, 323 U.S. 454 (1944); *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173 (1942); *United States v. Standard Oil Company*, 332 U.S. 301 (1947); *Bank of America National Trust & Savings Ass'n. v. Parnell*, 352 U.S. 29 (1956); *Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448

⁷30 U.S.C. 187.

⁸This basic principle was enunciated by the Fifth Circuit Court of Appeals in *Pan American Petroleum Corporation v. Wallis*, 344 F. 2d 432 at page 440 and is indisputable that: "In summary, when jurisdiction of the federal courts is based on diversity of citizenship, all nonfederal matters will be decided by applying the law of the state in which the court is sitting while federal issues in such cases will be decided by reference to federal law. Where federal matters are involved, the specific language of valid federal statutes will control when applicable; where federal statutes do not clearly articulate the law to be applied, federal courts must fill the interstices; federal courts

(1957); *United States v. 93.970 Acres of Land*, 360 U.S. 328 (1959); See also *United States v. Taylor*, 333 F. 2d 633 (1964); *Levitt v. Johnson*, 334 F. 2d 815 (1964); *American Pipe & Steel Co. v. Firestone Tire & Rubber Co.*, 149 F. 2d 872 (1945); 20 Am. Jur. 2d., Courts §208 at 543; 1 A Moore, Federal Practice 0.305 (3) at 3045, 3053 and 0.324, at 3759 (2d ed. 1961); Wright, Federal Courts, §60 at 213 (1963); Federal Courts — Rules of Decision, 50 Va. L. Rev. 1236 (1964); Clark, State Law in the Federal Courts: The Brooding Omnipresence of *Erie v. Tompkins*, 55 Yale L.J. 267 at 284, 285 (1946); Exceptions to *Erie v. Tompkins*: The survival of Federal Common Law, 59 Harv. L. Rev. 966 (1946); Hart, The Relations Between State and Federal Law, 54 Colum. L. Rev. 489, 509-15; 525-35 (1954); Mishkin, The Variousness of Federal Law: Competence and Discretion in the choice of National and State Rules for Decision, 105 U. Pa. L. Rev. 797 (1957); Friendly, in Praise of *Erie* — And of the new Federal Common Law 39 N.Y.U.L. Rev. 383, 422 (1964).

Federal Courts have always had the responsibility to effectuate the uniform implementation and protection of federal interests. It is not to be presumed that Congress ever intended that each of the several states would have, as Petitioner contends, the right to regulate, curtail or prohibit the effectiveness and consequences of the clearly comprehensive Mineral Leasing Act of 1920, as amended. "At the very least, effective Constitutionalism requires recognition of power in the federal courts to declare, as a matter of common law

can do this by reference to federal or state law and the choice here depends on a number of different factors. The first question presented in the instant case is whether or not 'federal matters' are involved."

or 'judicial legislation', rules which may be necessary to fill in interstitially or otherwise effectuate the statutory pattern enacted in the large by Congress." Mishkin, *The Variousness of Federal Law*, supra, at page 800.

Petitioner also denies the "federal courts' responsibility to develop federal common law in aid of the uniform implementation and protection of federal interests as respects the Leasing Act" because the United States did not acquire legislative jurisdiction over this land.⁹ However, it is wholly immaterial whether the State has or has not ceded legislative jurisdiction over the lands. The United States has the right, power, affirmative authority and duty to "protect its lands, to control their use and to prescribe in what manner others may acquire rights in them" [*Utah Power & Light Company v. United States*, 243 U.S. 389 (1917)] and this rule is controlling whether or not the federal rights involved arise from the United States' possession of legislative jurisdiction under Article 1, Section 8, Clause 17 of the Constitution. The status of public domain lands in the legislative jurisdiction sense is inconsequential. In no event can local state rules interfere and extend to any matter inconsistent with the plenary power of the United States. *McCullough v. Maryland*, 4 Wheat 316 (1819); *Fort Leavenworth R. R. v. Lowe*, 114 U.S. 525 (1885); *Camfield v. United States*,

⁹"The State has not ceded jurisdiction over the lands in question, and when this provision of Section 32 is considered in light of Article 1, Section 8, Clause 17 of the Constitution (Supra, p. 7), and, this Court's decision in *Wilson v. Cook*, 327 U.S. 474 (1945), and *Paul v. United States*, 371 U.S. 245 (1963), the applicability of local law to these private transactions, simply cannot be denied." (Page 26 of Petitioner's application for review)

167 U.S. 518 (1897); *Ohio v. Thomas*, 173 U.S. 276 (1899); *McKelvey v. United States*, 260 U.S. 353 (1922); *Hunt v. United States*, 278 U.S. 96 (1928).

APPLICABILITY OF FEDERAL LAW AS AFFECTING OUTSTANDING FEDERAL LEASES

The assertion of Petitioner that "The question of federal law decided below is of far reaching importance for if it is allowed to stand, it will not only directly affect and render questionable the title of all outstanding federal leases * * * " is untenable. It is not sustained by any reasons. Nor is it buttressed by any authorities. It is quite clear that the title to *all* outstanding federal leases could not conceivably be affected. Uniform federal law would confirm rather than cloud the title of *all* such leases which are "rights" constituting "property". Under federal law the federal government has an interest in federal statutes affecting such "rights" or "property".

The majority opinion that certain provisions of the Mineral Leasing Act of 1920 "leave no room for operation of any State law" is obviously not in conflict with Section 32 of the Act as Petitioner asserts, because as heretofore stated, Section 32 refers only to rights which the state "may have". It is indisputable that this provision of the Mineral Leasing Act was not intended to expand state authority over federal functions.

BOESCHE V. UDALL

Petitioner acknowledges and does not dispute this Court's decision in *Boesche v. Udall*, 373 U.S. 472 (1963)

but asserts that *Boesche* was erroneously interpreted below.¹⁰

Petitioner continues to rely on *Pan American Petroleum Corporation v. Pierson*, 284 F. 2d 649 (1960), and the early case of *Witbeck v. Hardeman*, 51 F. 2d 450 (1931) and related decisions. However, the decision of this Court in *Boesche* definitely establishes the legal distinction between a patent and a mineral lease, and further contrasts a mineral lease from a mining claim. *Pierson* placed a patent and a mineral lease in the same category and to this extent *Boesche* overruled *Pierson*, and further overruled *Pierson* as to the lack of authority of the Secretary of the Interior to cancel a mineral lease administratively.

The holding in *Pierson* was cited in the original dissenting opinion as dispositive of the litigation. The dissenting judge in his second opinion readily admitted that "The effect of this decision (*Pierson*) is uncertain, however, in view of *Boesche v. Udall* . . ."

In the *Boesche* case, the Court stated:

"We think that no matter how the interest conveyed is denominated the true line of demarcation is whether as a result of the transaction "all authority or control" over the lands has passed from "the Executive Department", *Moore v. Robbins*, supra (96 U.S. at 533), or whether the Government continues to possess some measure of control over them."

¹⁰The Court's reference to *Boesche v. Udall* is plain and unambiguous. It appears on pages 440 and 441 (344 F. 2d) of the opinion.

"Unlike a land patent, which divests the Government of title, Congress under the Mineral Leasing Act of 1920 has not only reserved to the United States the fee interest in the leased land, but has also subjected the lease to exacting restrictions and continuing supervision by the Secretary."

* * *

"In short, a mineral lease does not give the lessee anything approaching the full ownership of a fee patentee, nor does it convey an unencumbered estate in the minerals."

The distinction between a patent and a mineral lease was delineated and affirmed in *Udall v. Tallman* 13 L.ed. 616 (1965), which approved *Boesche*.

It is submitted that *Boesche* is conclusive authority for the rule that the government does have a continuing interest in a federal mineral lease on sovereignty land because in no sense does it divest itself of "all authority or control" therein upon issuance of the lease.

The Fifth Circuit Court of Appeals said:

"The posture of the instant case is **interstitial**. The Secretary has granted a lease to Wallis. We deal with claims that are, in essence, an alleged "option" and an alleged "assignment", but which ultimately, must be approved by or registered with the Secretary. We think, therefore, that there is a sufficient federal interest for the substantive independence of the federal

court in determining the claims of McKenna and Pan American."¹¹

* * *

"* * * we are impressed by the fact that the Mineral Leasing Act of 1920 represents a comprehensive scheme of federal regulation."¹²

"It is clear that the Mineral Leasing Act recognizes the devices of "assignments" and "options" as concomitants to the public policy against monopoly of federally-owned mineral deposits and, on the other hand, the public policy towards development of our mineral resources and increasing our domestic reserves. We do not think the use of these devices as a part of the scheme of carrying forth this public policy should be limited by interstitial restrictions imposed by the law of the State of Louisiana, which are not present in other states. In a word, we think this is an area for uniformity."¹³

¹¹*United States v. Standard Oil Company*, 332 U.S. 301 (1947).

¹²The language of this Court in the case of *Sola Electric Company v. Jefferson Electric Company*, 317 U.S. 173 (1942) is uniquely applicable herein: "* * * In such a case our decision is not controlled by *Erie R. Co. v. Tompkins*, 304 U.S. 64, 82 L.ed 1188, 58 S.Ct. 817, 114 ALR 1487. There we follow state laws because it was the law to be applied in the federal courts. But the doctrine of that case is inapplicable to those areas of judicial decisions within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they effect must be deemed governed by federal law having its source in those statutes, rather than by local law."

¹³"In our choice of the applicable federal rule, we have occasionally selected state law . . . But reasons which may make state law at times the appropriate federal rule are singularly inappropriate here . . . The application of state law even without

UNIFORMITY

Hodgson v. Federal Oil and Development Company, 274 U.S. 15 (1927), does not support Petitioner's conclusions, but demonstrates the correctness of the interpretation of that case by the Fifth Circuit, 344 F. 2d 422, footnote 7. In *Hodgson*, the plaintiff attempted to impress a trust upon a federal mineral lease on land in Wyoming. The lease interest of the plaintiff was purchased at a different time from the vestiture of title in plaintiff's cotenants. The Court held: " * * * to support the view that in equity and in good conscience the Oil and Development Co. acted for the McMannus heirs in securing the existing lease, it would be necessary to allege definite facts (not mere conclusions) sufficient to show some fiduciary relationship between them. This has not been done, unless such a relationship necessarily arose because of cotenancy." The Court in *Hodgson*, then stated that the Plaintiff was forbidden as a cotenant from acquiring and asserting adverse title because the interest of the plaintiff accrued at a different time, and thereby plaintiff was bound by the exception to the general rule concerning a breach of trust arising out of a cotenancy derivative from an identical source. The Fifth Circuit herein specifically interpreted *Hodgson* as applying the law of the several states involving a breach of trust, saying, "We read *Hodgson* as fashioning a federal law of fiduciary relationship by drawing on the law of several states."

the conflict of laws rule of the forum, would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of several states." (Emphasis added) *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943); See also *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917).

Petitioner admits (p. 52) that in *Hodgson* " * * * the Court applied Federal law to the extent possible . . . " The opinion in *Hodgson* also shows that the common law of several states was applied by the Court. As the Court indicated, if the plaintiff had alleged "definite facts (not mere conclusions) to sufficiently show some fiduciary relationship between them", plaintiff would have had adequate ground for relief.

The Mineral Leasing Act is federal in scope. It is a comprehensive pattern intended by Congress to preempt the field of federal mineral leases. The federal common law is fashioned basically to effectuate the rights, duties and policies of the United States in a diversity action. Therefore, the extent and legal consequences of the paramount right of the United States to know the real lessee is a substantive national "interest". Otherwise, the government's admitted public policy against "lease grabbing" would be frustrated through devices designed to circumvent this policy. True ownership of a federal lease affecting the public domain necessarily involves national interests. Such ownership is not such a local matter as may be determined by a unique local law at variance with the laws of the several states.

Petitioner has insisted that his procurement of the public domain lease was "none of Pan American's business". The Court will take judicial notice that the lease was issued by the Department of the Interior which is permanently located in Washington, D. C. Respondent's action for specific performance is based, as the United States District Court held, on "a breach of trust, as alleged". All acts of Petitioner during the prosecution of the public domain lease in breach of his

trust are essential ingredients to the issuance of the lease by the Department of the Interior in his name. Petitioner's thrust that these unfaithful acts were "none of Pan American's business" is the final overt demonstration of fraud. At the instant this federal lease was issued to Wallis, the equitable title thereto, under common law precepts, became vested in Pan American by virtue of a constructive trust. It is this equitable title which Petitioner seeks to deny and avoid simply because Petitioner was sued in a federal court in Louisiana which uniquely does not recognize "constructive trusts".

Duplicity by an agent for selfish gain has been denounced universally in Christian jurisprudence since the Scriptures. The purity of the fiduciary relationship is a precept of morality untarnished by the Ages.

"No man can serve two masters; for either he will hate one, and love the other; or he will attach himself to one and think lightly of the other. You cannot be servants both of God and of money." Matthew 6:24; Luke 16:13.

The facts in *Massie v. Watts*, 6 Cranch 148 (1810), invite comparison with those in the instant suit. Both cases involve a fiduciary who attempted to take advantage for his personal gain of an error in the description of land he was obligated to obtain pursuant to his trust. Massie acted as a "locator." Wallis acted under the Option as an Applicant. Massie encountered difficulties respecting the location. Wallis encountered difficulties respecting the location also, the final description of which he was advised had to be "foolproof" to overcome the prior "vulnerable" descriptions in his

own original "acquired lands" offers and the competitive Morgan offers. Massie, as agent, entered and surveyed a portion of the same land for himself. Wallis correctly described *the same land* for himself and simply filed new offers on the advice of counsel. Massie obtained a patent in his own name. Wallis obtained a mineral lease from the United States in his own name. The filing by Wallis of the "public lands" offer for himself coupled with the "hiding" and "sterilization" of the T. Miller Gordon offer in the name of his brother-in-law, plus the new "foolproof" description, all constitute a "withdrawal" — identical in effect with Massie's withdrawal — of the "acquired lands" offers.

The location of the public domain lands in Louisiana and the domicile of Wallis in Louisiana are purely incidental to the fundamental fact that it is the determination of ownership of a federal lease issued pursuant to federal activities in Washington, D. C. which is involved so that the uniform principles of federal law in this area of federal concern must be applied. It is submitted that the victim of Wallis's acts should not be deprived of the Option to obtain this federal lease simply because Wallis happens to reside in Louisiana.

Interstitial restrictions imposed by Louisiana may not decree who the federal government's lessee shall be and may not under any circumstances prohibit or interdict the transfer of federal leases. The judicial determination of the rights of Petitioner and Respondent with respect to the ownership of the federal lease must be governed exclusively by a uniform rule of law which recognizes the equitable principle of resulting and constructive trusts. The principle is stated in the landmark decision of *Irvine v. Marshall, et al.*, 61 U.S.

(20 How.) 558 (1858), cited by the Fifth Circuit Court of Appeals on pages 434-435 (344 F. 2d) of the opinion, and which approved *Massie*, *supra*.

The dissenting opinion admits that under the Mineral Leasing Act the federal government is entitled to know the identity of its mineral lessee. Yet, if the dissenting opinion were otherwise followed to its logical conclusion, the federal government would be wholly deprived of this vital right affecting the national interests because UNDER LOUISIANA LAW, AS STATED BY THE DISSENTING OPINION, EVIDENCE COULD NOT BE HEARD TO DETERMINE THE UNDISCLOSED TRUE OWNER OF A FEDERAL LEASE. To recognize the sanctity of undisclosed ownership because of a unique rule in Louisiana would prevent the federal government from enforcing as to public domain land in Louisiana the provisions of the Mineral Leasing Act with respect to control of acreage under the monopoly provisions thereof and would place the government in the position at all times of NOT being able to ascertain the true operator of a federal lease which affects national security.

The original dissenting opinion was predicated on the misconceived conclusion that "there is no distinction between a patentee and a lessee of a mineral lease, as far as passage of title to the mineral is concerned". However, *Boesche*, *supra*, which demonstrated the distinction between a patentee and a lessee of a mineral lease had already been decided, but was not considered. *Boesche* had overruled *Pierson* on the point that the latter held there was no distinction between the two.

The following language of the second dissenting opinion indicates that it stems from "fear" that the majority holding for uniformity will result in the cataclysmic juridical devastation of long established law which would create chaos with respect to property rights of the laws of several states:

"The holding of the Court carries alarming implications. If federal common law controls and the claimants hold an equitable title by virtue of a constructive trust, what is Mrs. Wallis's interest? Assuming that Wallis has a part interest as lessee, does his wife have half of his interest as her share in the community? Or is she a common law partner with him? Or does she have no interest in the lease? Are Wallis's children deprived of their legitime, their forced portion of their father's estate, as to their father's interest in the lease? I hope my fears are all bloodless ghosts. But if a federal court, in the name of interstitial law-making, may concoct a Law of Property, Law of Contracts, Law of Restitution and, perhaps, a Law of Descent and Distribution for Mississippi Mud-Lumps, I forsee the fashioning of some fancy legal systems for a great many federal enclaves within the borders of the states." (344 F. 2d 444)

It is difficult to understand the "alarming implications" of the decision of the Court because:

(a) The law of the land as expressed in *Hood v. McGehee*, 237 U.S. 611, 615 (1915) is uncontroverted that each state is sole mistress of the devolution of land by descent, and this principle embraces any real right the

situs of which is in the particular state. The devolution of property is governed universally by local laws of descent and distribution which remain unaffected by the majority decision.

(b) As stated by the author of the dissenting opinion as the organ of the Court in *Akin v. Louisiana National Bank of Baton Rouge*, 322 F. 2d 749 (1963), "There are several reasons why a federal court has no jurisdiction to probate a will or to administer an estate".

The applicability of uniformity to federal leases obviously does not hinge on "alarming implications" and "fears" of "bloodless ghosts". Federal law governs all facets of the Mineral Leasing Act, its effectiveness and consequences, including ownership of a federal lease, while state law remains untouched to regulate descent and distribution.

Summarizing, federal law which is clearly applicable to the facts presented herein is also applicable to all transactions affecting such leases issued pursuant to the Mineral Leasing Act. The nature of the rights and obligations created by federal leases would be affected by a myriad of uncertainties in the absence of a uniform law which provides a certain and definite guide to the rights of the parties, rather than subjecting them to the vagaries of the laws of many states. While the business of the United States may go on without uniformity, the policy of applying federal law to all transactions affecting federal leases is of substantive interest and concern in establishing certainty and definiteness by having one set of rules governing the rights of all parties to federal mineral leases, as contrasted to multiple rules.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

LLOYD J. COBB
MORRIS WRIGHT
METTERY I. SHERRY, JR.
902 Whitney Building
New Orleans, Louisiana

WILLIAM P. HARDEMAN
PERCY SANDEL
1016 St. Charles Avenue
New Orleans, Louisiana

Attorneys for Respondent,
Pan American Petroleum
Corporation

August 27, 1965

SEP 14 1963

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1963

No. 341

FLOYD A. WALLIS,

Petitioner.

— Petitioner —

PAN AMERICAN PETROLEUM CORPORATION,

Respondent.

FLOYD A. WALLIS,

Petitioner,

— Petitioner —

PATRICK A. McKENNA,

Respondent.

(Pan American Petroleum Corporation,
Initially A Co-Defendant With Wallis)

**PETITIONER'S SUPPLEMENTAL AND
REPLY BRIEF.**

**C. ELLIS HENICAN,
MURRAY F. CLEVELAND,**
Suite 2601, 225 Baronne Street,
New Orleans, Louisiana 70112;

H. M. HOLDER,
1300 Beck Building,
Shreveport, Louisiana 71101,
Attorneys for Petitioner.

INDEX.

	Page
PETITIONER'S SUPPLEMENTAL AND REPLY BRIEF	1
I. ADDITIONAL CONFLICTING DECISIONS	1
II. THE BRIEFS IN OPPOSITION	4
A. "Respondents' Statement of Case"	4
B. Importance of Question Presented	7
C. Section 32 Of The Leasing Act	8
D. The Rights, Interests, Duties Or Substan- tive Policies Of The United States	9
III. CONCLUSION	12
CERTIFICATE OF SERVICE	12

CITATIONS.

Cases.

Blackner v. McDermott, 176 F. (2d) 498	2
Boesch v. Udall, 373 U. S. 472	4
Bolack v. Underwood, 340 F. (2d) 816	2, 4, 9
Ducie v. Ford, 138 U. S. 587	4
Hodgson v. Federal Oil and Development Co., 274 U. S. 15	4
Sola Electric Company v. Jefferson Electric Com- pany, 317 U. S. 173	10, 11

STATUTES AND RULE OF THIS COURT.

Mineral Leasing Act of 1920; Act of February 25, 1920; 41 Stat. 437; 30 U. S. C. A. 181, et seq., Section 32	8, 9, 10, 11
Rule 40, Paragraph 3, of the United States Supreme Court	5



IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 341

FLOYD A. WALLIS,

Petitioner,

versus

PAN AMERICAN PETROLEUM CORPORATION,

Respondent.

FLOYD A. WALLIS,

Petitioner,

versus

PATRICK A. McKENNA,

Respondent.

(Pan American Petroleum Corporation,
Initially A Co-Defendant With Wallis)

**PETITIONER'S SUPPLEMENTAL AND
REPLY BRIEF.**

I.

ADDITIONAL CONFLICTING DECISIONS.

May It Please the Court:

As noted in the petition for certiorari (p. 16), the majority below conceded that its decision **was contrary** to

the decision of the Tenth Circuit in the case of *Blackner v. McDermott*, 176 F. (2d) 498 (1949). Additionally, we noted at page 18 of the petition, other decisions of various Circuit Courts of Appeal, **including one by the Fifth Circuit**, all of which are in conflict with the majority opinion below.

We now wish to call to this Court's attention, still another decision by a Circuit Court of Appeals which is directly in conflict with, and contradictory to, the decision below. We refer to the recent decision, rendered while these cases were pending on rehearing below, of *Bolack v. Underwood*, 340 F. (2d) 816 (C.C.A., 10th, 1965). In *Bolack*, as in the cases at bar, the suit involved a dispute between private individuals over the ownership of an oil and gas lease covering Federal lands. Both parties held assignments of the Federal lease executed by the lessee, however, the first assignee (Bolack) **had not recorded his assignment as required by the laws of New Mexico, although it had been filed in the records of the Federal Land Office**. In holding in favor of the junior, or second, assignee of the lease (Underwood), the Court **applied local law**, saying at page 819:

"The answer to the question of whether Underwood may be considered an innocent purchaser for value is dependent upon whether the records at the Federal Land Office constitute constructive notice to a purchaser of a federal lease. New Mexico law is to the effect that the federal land office records do not constitute such notice, as sections 65-2-1 et seq., N.M.S.A., require that assignments of interests and royalties in federal oil and gas leases be recorded in the appropriate county clerk's office, and

sections 71-2-1 et seq. provide that an instrument that is not recorded cannot affect the title or right to real estate of any purchaser in good faith. New Mexico law also provides that an interest in an oil and gas lease constitutes an interest in real property, e.g., *Rock Island Oil & Refining Co. v. Simmons*, 73 N. M. 142, 386 P. 2d 239. **There is no federal statute governing disputes between private individuals regarding rights to federal oil and gas leases, and in such instances, where no right of the federal government is involved, state law governs.** See *Bank of America Nat. Trust & Sav. Ass'n v. Parnell*, 352 U. S. 29, 77 S. Ct. 119, 1 L. Ed. 2d 93; *United States v. Union Livestock Sales Co.*, 4 Cir., 298 F. 2d 755, 96 A.L.R. 2d 199.

"Viewed in this posture, the problem at hand is reduced to the simple issue of **whether under New Mexico law** Underwood is chargeable with notice of the prior assignment to the Bolacks . . ."

Here then is a decision which squarely contradicts the decision below, for it holds that (1) "There is no **federal** statute governing disputes between private individuals regarding right to federal oil and gas leases,"—yet the majority below holds that the Leasing Act itself requires the Courts to fashion a law applicable to such disputes, and (2) **but more important**, the decision holds that in such a private dispute, "no **right** of the federal government is involved,"—and while the majority below could never point out wherein any right, or, interest of the federal government was involved in these private disputes, yet it held that "uniformity" in the law applicable to such disputes is re-

¹ All emphasis supplied herein, unless otherwise noted.

quired. We submit the two decisions cannot be reconciled, and the petition should be granted.²

II.

THE BRIEFS IN OPPOSITION.

No extended reply is required as respects the briefs filed by respondents in opposition to Wallis' application. By way of generalization, we point out that neither brief denies, or even purports to deny by inference, the fact that the majority opinion below is in direct conflict with some six decisions of the various Circuit Courts of Appeal. Nor does either of the briefs demonstrate a lack of conflict between the decision below and this Court's decision in *Ducie v. Ford*, 138 U. S. 587 (1871).³

The same is true as respects this Court's decision in *Hodgson v. Federal Oil and Development Co.*, 274 U. S. 15 (1927), discussed at p. 49 of the petition. While both briefs attempt to cope with *Hodgson*, yet both treatments entirely ignore the fact that that decision was rendered prior to the development by this Court of the "doctrine of abstention."

A. "Respondents' Statement Of Case."

The majority opinions below reached no conclusion concerning the disputed factual issues, but simply re-

² It should be noted that the decision in *Bolack* was rendered quite some time after this Court's decision in *Boesche v. Udall*, 373 U. S. 472 (1962). Yet the Court in *Bolack* did not feel called upon to even cite *Boesche*, much less consider whether or not it might bear upon the point in question.

³ Pan Am's brief does not even mention *Ducie*, and McKenna's brief (p. 8) is unable to deny the square conflict, but merely makes the unsupported statement that: "the question of whether federal law should instead apply was not raised."

manded the case for re-trial on all such disputed factual issues. Accordingly, in preparing the petition for certiorari, and more particularly the "Statement Of Case," Wallis attempted to comply with the requirements of the Rules of this Court, and confine such statement to a recitation of such facts as would properly present the questions presented for review. In doing so, Wallis attempted to confine the factual recitation to those factual matters decided and ruled upon by the Trial Court, avoiding factual issues not passed upon by the Trial Court, or, confining it to facts about which there was no dispute.

While neither of the briefs in opposition makes any specific objection to Wallis' "Statement Of Case," yet both briefs purport to give a "Statement Of Case." This Court's Rule 40, par. 3, calls for a "Statement Of Case" by a respondent where "necessary in correcting any inaccuracy or omission in the statement of the other side . . ." Neither of respondent's "statement" suggests any inaccuracy in Wallis' "Statement," and nothing contained in either such "statement" supplies any "omission" relevant to the questions presented for review. It is therefore obvious, that both respondents utilized the device of presenting a "statement," solely for the purpose of "smearing" Wallis. It is an old adage that when a litigant has neither the law nor the facts in his (its) favor, the best approach is to abuse his (its) adversary. This is the technique which has obviously been employed by Respondents herein. However, this is not the proper place to attempt a refutation of these unsubstantiated accusations leveled at Wallis, for they are not relevant to the proceeding before this Court, nor are they supported by any finding of fact by either of the Courts below. However, Wallis does feel constrained to make one comment as respects each such "statement."

At page 4 of McKenna's brief, an **extract** from a letter of May 4, 1956 is quoted by McKenna, followed by the statement that Wallis "refused to honor his agreement." This was done in such fashion as to make it appear that the quoted letter-extract reflected the agreement between the parties, which Wallis would not "honor." The Trial Court **found as a fact**⁴ that the agreement between Wallis and McKenna was reflected by a letter agreement⁵ dated December 27, 1954, **not May 4, 1956.**⁶

Pan Am, in its statement (p. 6) purporting to give the "decision" of the Trial Court, only quotes three partial extracts therefrom, one of which was clearly designed to convey the impression that the Trial Court made a "finding" that Wallis had **in fact** committed a "breach of trust." However, when the statement is quoted in its full context, it is apparent that the Court was merely quoting an abstract proposition of local law, and that it made no such finding of fact. The complete statement is as follows:

" . . . Any new understandings reached in 1956, 1957, 1958 or 1959 are unenforceable in the absence of a writing. Nor does it matter whether Wallis obtained his lease by breaching his trust, **as alleged.** If the claimants acquired an interest in the lease, it is under the written instruments, **not by virtue of any subsequent estoppel.** (Court's foot-

⁴ The Trial Court said: "McKenna's claim is imprisoned in the letter agreement of December 27, 1954—January 3, 1955; . . ." Cf. Opinion of the Trial Court, page 106 of the original petition herein.

⁵ This letter agreement appears at page 159 of the original petition herein.

⁶ As respects this letter of May 4, 1956, McKenna in quoting therefrom, conveniently omitted the reference thereto in the record of this proceeding. A reference thereto will show that the letter was captioned with a reference to the five "acquired lands" lease applications which were the subject matter of the December 27, 1954 letter agreement between the parties.

note) See *Scurto v. Le Blanc*, 191 La. 136, 184 So. 567; *Pan American Production Co. v. Robichaux*, 200 La. 666, 8 So. 2d 635; *Wier v. Glassell*, *supra*; *Blevins v. Manufacturers Record Publishing Co.*, 235 La. 708, 105 So. (2d) 392, 414 (on rehearing), and cases there cited. **Of course, if Wallis did in fact breach his agreements**, he may be answerable in damages or compelled to make restitution. LSA-C.C. Arts. 1926, 1928, 1930-1934. But neither dissolution of the contract, nor damages, are prayed for here. This is a suit for specific performance only."

B. Importance Of Question Presented.

Both of respondents attempt to belittle petitioner's assertion of the importance of the question presented in this proceeding. They protest that it is pure speculation. However, neither of respondents cites a single prior decision since the passage of the Leasing Act in 1920, which supports the decision of the majority below. On the other hand, petitioner cites some seven decisions rendered since the passage of the Act, all contrary to the decision below. It is obvious that these contrary decisions, having stood without question for some forty-odd years,—have served as the basis for, and guide to, transactions involving trafficking in Federal oil and gas leases. As we pointed out in the petition, these Court decisions are in keeping with the similar practice of the officials of the Land Office. Until such time as the conflict now created by the decision below is resolved by this Court, these conflicting decisions necessarily present a question, not only as to transactions had in the past, but they also present a quandary as to precisely what law is applicable in the future—whether the transac-

tion (as noted by Judge Wisdom) results from contract, Court proceeding, inheritance, restitution or any other source.

C. Section 32 Of The Leasing Act.

Neither respondent could adequately explain the proviso of Sec. 32 of the Leasing Act, that nothing in the Act "shall be construed or held to affect the rights of the States . . . to exercise any rights which they may have" In fact the two respondents could not even agree between themselves, as to a suggested explanation. McKenna distorts Wallis' contention by saying (p. 6) that Wallis contends, in light of Sec. 32, "that the 'rights of the States' includes the 'exercise' of a right by a State to determine what law is to govern in a suit filed in federal court." Having advanced this "straw-man," McKenna would then dispose of this matter, by characterizing it as an "absurdity." But Sec. 32 of the Act is not the State speaking or trying to tell a federal Court what law to apply. Sec. 32 is Congress speaking and Congress can tell a federal Court what law to apply. The majority opinion, upon which respondents rely, conceded the right and cause of action asserted by both respondents was "State-created," but in holding that federal law is applicable to these private transactions, the same opinion purports to follow the direction of Congress, by relying on some vague and ill-defined "public policy," which it **concludes** is related to these private transactions. If Sec. 32 does not preclude this conclusion, then precisely what does Sec. 32 cover or include?

Neither respondent offers or suggests an answer to this question. Thus Pan Am says (p. 9) that Sec. 32 "did not CREATE any rights in favor of the states," and Pan Am further says Sec. 32 "did not RECOGNIZE any rights of the states."⁷ But Pan Am does not address itself to the central question, to-wit: Did Sec. 32 PRESERVE the rights of the States? Since the majority below concedes the right and cause of action asserted are State-created, is it not a "right" of the State to have its "public policy," as reflected by local law, govern the disposition of such cause and right of action? This question is likewise avoided by respondents.

D. The Rights, Interests, Duties Or Substantive Policies Of The United States.

As above noted, the majority opinion below made no effort to demonstrate wherein the outcome of these private disputes, would in any way affect the rights or interests of the United States. The *Bolack* case, *supra*, is a square holding that the United States has no such interests or rights. Recognizing this deficiency in the majority opinion, Pan Am attempts (p. 17) to supply this deficiency, with the following conclusion:

"Therefore, the extent and legal consequences of the paramount right of the United States **to know the real lessee** is a substantive national 'interest.' "

This ludicrous conclusion, which the majority below would not even sponsor, is completely refuted by the provisions of

⁷ The emphasis in both quotes, is that of Pan Am.

the Leasing Act, and more particularly Sec. 30 and Sec. 30(a) thereof, for when the lease is initially granted, the Secretary unquestionably "knows" precisely who is the lessee. And Sec. 30(a) provides that "**subject to the final approval** by the Secretary" an assignment or sublease "shall take effect as of the first day of the lease month FOLLOWING the date of FILING IN THE PROPER LAND OFFICE of three original executed counterparts thereof, together **with** any required bond and proof of qualification under this Act of the assignee or sublessee to take or hold such lease . . ." Thus, by this provision, Congress has made full and adequate provision to "know" the "real lessee" at all times, and a more "air-tight" provision could not be made. But if we concede the contrary (for sake of argument), Sec. 32 of the Act delegates to the Secretary—not to the Courts, the rule-making power to implement the statute and make adequate provision therefor.

In support of this phase of its brief, Pan Am cites, and places great reliance upon, this Court's decision in *Sola Electric Company v. Jefferson Electric Company*, 317 U. S. 173 (1942), which Pan Am states is "uniquely applicable herein." Pan Am's quotation from *Sola* (footnote 12, p. 15) commences with this statement: "In **such a case** our decision is not controlled by *Erie R. Co. v. Tompkins* . . ." What is the "such a case," which Pan Am so conveniently omits and fails to give? It is this:

"It is familiar doctrine that the **prohibition** of a **federal statute** may not be **set at naught**, or its **benefits denied**, by state statute or state common law

rules. **In such a case** our doctrine is not controlled by *Erie R. Co. v. Tompkins* . . ."

Neither respondent, nor the majority below, attempts to point out any "prohibition of a federal statute . . . set at naught, or its benefits denied," by the decision of the Trial Court, and failing to do so simply demonstrates why *Sola* IS NOT "uniquely applicable here," as contended for by respondent.

On the other hand, the above quoted extract from *Sola* completely demonstrates why Sec. 32 of the Leasing Act is applicable to the cases at bar. Thus the above quoted extract from *Sola* demonstrates (as did the decision by the Court of Appeals in *Sola*) that the cause and right of action asserted were created by local law based upon contract, and under local law the defense of estoppel was a good defense. This Court reversed because of "the prohibition of a federal statute," and in the cases here involved the majority reverses because of the Mineral Leasing Act—some ill-defined "policy" of the Act. Yet the Leasing Act (Sec. 32) provides that "nothing in this Act shall be construed or held to affect the rights of the States . . . to exercise any rights which they may have . . ." We submit that a "right" of a State is to have its "public policy" as evidenced by its laws, applicable to, and dispositive of, a State-created cause and right of action. *Sola* acknowledges that such would be the case, but for the "prohibition" of a federal statute, yet Sec. 32 of the Leasing Act says the Act shall not be held or so construed to operate as such a "prohibition."

III.

CONCLUSION.

Petitioner shows that the petition for certiorari should be granted.

Respectfully submitted,

C. ELLIS HENICAN,
MURRAY F. CLEVELAND,
Suite 2601, 225 Baronne Street,
New Orleans, Louisiana 70112;

H. M. HOLDER,
1300 Beck Building,
Shreveport, Louisiana 71101,
Attorneys for Petitioner.

CERTIFICATE OF SERVICE.

I, MURRAY F. CLEVELAND, hereby certify that a copy of the foregoing Supplemental And Reply Brief, was served upon Counsel of Record in the Court below, representing Respondent Patrick A. McKenna, and, representing Respondent Pan American Petroleum Corporation, by enclosing each such copy in an envelope, duly addressed to each such Counsel of Record at his post office address, with the required air mail first class postage prepaid and affixed thereto, and depositing same in the United States Post Office at New Orleans, Louisiana, on this _____ day of September, 1965.

MURRAY F. CLEVELAND, Counsel of
Record for Petitioner.



RE COPY

Office-Supreme Court, U.S.

FILED

DEC 2 0 1965

JOHN E. DAVIS, CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 341

FLOYD A. WALLIS,

Petitioner,

versus

PAN AMERICAN PETROLEUM CORPORATION,

Respondent.

FLOYD A. WALLIS,

Petitioner,

versus

PATRICK A. McKENNA,

Respondent.

(Pan American Petroleum Corporation, Initially A Co-
Defendant With Wallis)

**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT.**

BRIEF FOR FLOYD A. WALLIS.

C. ELLIS HENICAN,
MURRAY F. CLEVELAND,
Suite 2601, 225 Baronne Street,
New Orleans, Louisiana 70112;

H. M. HOLDER,
1300 Beck Building,
Shreveport, Louisiana 71101,
Attorneys for Petitioner.

INDEX.

	Page
A. OPINIONS BELOW	1
B. JURISDICTION	2
C. STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED	2
D. QUESTIONS PRESENTED FOR REVIEW ..	3
E. STATEMENT OF CASE	7
F. SUMMARY OF ARGUMENT	16
G. ARGUMENT	22
I. The decision of the majority below is contrary to the Secretary's administrative interpretation and application of the Leasing Act.	22
II. The comprehensiveness of the Mineral Leasing Act, and, the need for uniformity—as opposed to the proviso of Section 32 of the Act reserving the right to the states “to exercise any rights” which they may have	27
III. The original opinion of the majority below and the <i>Boesche</i> case, in light of decisions concerning the Public Land Laws, generally, and the decisions interpreting the Mineral Leasing Act	39
A. The decisions relating to the Public Land Laws as respects the nature of inceptive rights while the legal title remains in the United States	40

INDEX—(Continued)

	Page
B. Decisions relating to the Public Land Laws as respects the equitable power of the courts and the application of federal law	48
C. Decisions relating to and interpreting the Mineral Leasing Act, are contrary to the decision below	56
D. The <i>Boesche</i> case as it relates to private transactions had by a mineral lessee with third parties, does not support the decision below	69
IV. The majority opinion below on petitions for rehearing and the devices of "assignments" and "options"	73
A. Section 30 of the Act relative to the Secretary's approval of assignments or subleases, as interpreted by the decision below, is contrary to past decisions interpreting the Leasing Act, and, is contrary to Sec. 30 (a) of the Act	76
B. Recognition by the Leasing Act of "options" as concomitants to the public policy against monopoly	83
H. CONCLUSION	86
CERTIFICATE OF SERVICE	87
Appendix:	
Additional statutes involved	89

CITATIONS.

Cases.	Page
Alabama v. Texas, 347 U. S. 272.....	40
Alaska Consolidated Oil Fields v. Rains, 54 F. 2d 868	63, 81
Bank of America National Trust & Savings Assn. v. Parnell, 352 U. S. 29.....	35, 36
Best v. Humboldt Mining Co., 371 U. S. 334.....	40, 68
Black v. Elkhorn Mining Co., 163 U. S. 445.....	46, 72
Black v. Jackson, 177 U. S. 349	44, 45
Blackner v. McDermott, 176 F. 2d 498.....	64, 81-82
Boesche v. Udall, 373 U. S. 472.....	16, 17, 18, 37, 39 40, 41, 58, 68, 69, 70, 72, 73, 74
Bolack v. Underwood, 340 F. 2d 816.....	35, 65, 67, 82
Bohall v. Dilla, 114 U. S. 47.....	51
Buscher v. Buscher, 231 U. S. 157.....	47
California Company v. Udall, 296 F. 2d 384.....	74
Cameron v. U. S., 252 U. S. 450.....	46
Clearfield Trust Co. v. U. S., 318 U. S. 363.....	61
Davies Warehouse Co. v. Bowles, 321 U. S. 144....	30
Ducie v. Ford, 138 U. S. 587.....	47, 55, 62
Farmers Union v. WDAY, 360 U. S. 525.....	32
Forbes v. Gracey, 94 U. S. 762.....	46, 72
Francis v. Southern Pacific Co., 333 U. S. 445....	31

CITATIONS—(Cases Continued)

	Page
Free v. Bland, 369 U. S. 663	35
Gauthier v. Morrison, 232 U. S. 452	43
Gibbons v. Pan American Petroleum Corporation, 262 F. 2d 852	81
Hamilton Foundry & M. Co. v. International M. & F. Wkrs., 193 F. 2d 209, cert. denied 343 U. S. 966	38
Hayes v. Muller, 245 La. 356	86
Hodgson v. Federal Oil and Development Co., 274 U. S. 15	57, 58-59, 61, 62, 67
Irvine v. Marshall, 61 U. S. (20 How.) 558	5, 15, 52
Irvine v. Marshall and Barton, 7 Minn. 286	5, 51
Isaacs v. De Hon, 11 F. 2d 943	80
Johnson v. Towsley, 80 U. S. 72	48, 50, 57, 59, 67
Lytle v. Arkansas, 63 U. S. (22 How.) 193	44
Manuel v. Wulff, 152 U. S. 505	49, 79, 82
Marquez v. Frisbie, 101 U. S. 473	45, 50, 51, 52
McCune v. Essig, 199 U. S. 382	47
McKenna (Pan Am) v. Wallis, 200 F. Supp. 468 ..	1
McLaren v. Fleischer, 256 U. S. 477	26
Mid-Northern Co. v. Walker, 268 U. S. 45	29
Morgan v. Udall, 306 F. 2d 799, cert. denied 371 U. S. 941	11, 53

CITATIONS—(Cases Continued)

	Page
Myers v. Croft, 80 U. S. 291	43
Oldland v. Gray, 179 F. 2d 408, cert. denied 339 U. S. 948	49, 64, 82
Pan American Petroleum Corporation v. Pierson, 284 F. 2d 649, cert. denied 366 U. S. 936	64, 70
Paul v. U. S., 371 U. S. 245	31, 33
Radio Station WOW v. Johnson, 326 U. S. 120	32
Rector v. Gibbon, 111 U. S. 276	49
San Diego Unions v. Garmon, 359 U. S. 236	36, 37, 38
Sola Electric Co. v. Jefferson Electric Co., 317 U. S. 173	34
Standard Oil Co. of California v. U. S., 107 F. 2d 402, cert. denied 309 U. S. 654	40, 50
Steel v. St. Louis Smelting and Refining Co., 106 U. S. 447	51
St. Louis Smelting and Refining Co. v. Kemp, 104 U. S. 636	50
Textile Workers v. Lincoln Mills, 353 U. S. 448	37, 38
The Leiter Minerals, Inc., v. U. S., 329 F. 2d 85 (U. S. v. The Leiter Minerals, Inc., 381 U. S. 413)	33, 61
U. S. v. Buchanan, 232 U. S. 72	43, 56, 70
U. S. v. Certain Property, etc., 306 F. 2d 439	31, 61
U. S. v. Trinidad Coal & Coking Co., 137 U. S. 160	42

CITATIONS—(Cases Continued)

	Page
Utah Power & Light Co. v. U. S., 243 U. S. 389.....	41
Wheeldin v. Wheeler, 373 U. S. 647.....	36
Wilcox v. McConnel, 38 U. S. 498.....	24, 67
Williams v. U. S., 138 U. S. 514.....	47, 54, 68, 77
Wilson v. Cook, 327 U. S. 474.....	31
Witbeck v. Hardeman, 51 F. 2d 450, affirmed 286 U. S. 444	62, 81

CONSTITUTION, STATUTES AND REGULATIONS.

U. S. Constitution:

Article I, section 8, clause 17	2, 31
Mineral Leasing Act of 1920; Act of February 25, 1920; 41 Stat. 437; 30 U.S.C.A. 181, et seq. 3, 18, 20, 37, 38, 39, 56, 68, 69	
Section 1	App. 89
Section 17 (as amended in 1935)	24, 71, App. 90
Section 18 (as originally enacted)	57, 58, 59, App. 90
Section 27 (as amended in 1946)	84, 85, App. 92
Section 27 (as amended in 1948)	App. 95
Section 27 (as amended in 1954)	84, App. 99
Section 28	71, App. 102
Section 30	26, 37, 39, 76, 77, 79, 80, 82, App. 103
Section 30 (a)	22, 26, 27, 76, 77, 78, 79, App. 104

CONSTITUTION, STATUTES AND REGULATIONS—(Continued)

	Page
Section 32	
6, 16, 17, 21, 27, 28, 30, 31, 32, 33, 34, 39, App. 106	
Mineral Leasing Act For Acquired Lands; Act of August 7, 1947; 61 Stat. 913; 30 U.S.C.A. 351, et seq.	3
Mining Law of May 10, 1872, c. 152, § 3 and § 5, 17 Stat. 91, 92; R.S. §§ 2322 and 2326; 30 U. S. C. 26, 28	3, 72, App. 106-109
Rules of Decision Act, 28 U.S.C. 1652	3
28 U.S.C. 1254(1)	2
Act of April 30, 1926, 44 Stat. 373	26
Act of July 3, 1930, 46 Stat. 1007	26
Act of March 4, 1931, 46 Stat. 1523	26
Act of Aug. 21, 1935, 49 Stat. 674	26
Act of Aug. 26, 1937, 50 Stat. 842	26
Act. of Aug. 8, 1946, 60 Stat. 950	26
Act of June 1, 1948, 62 Stat. 285	26
Act of Sept. 1, 1949, 63 Stat. 682	26
Act of July 29, 1954, 68 Stat. 583	26
Act of Aug. 2, 1954, 68 Stat. 648	26
Act of Sept. 21, 1959, 73 Stat. 571	26
Act of Sept. 2, 1960, 74 Stat. 781	26

TEXT AND MISCELLANEOUS.

	Page
"Oil and Gas Leases On United States Government Lands," Ross L. Malone, Jr., 2nd Ann. Institute On Oil And Gas Law And Taxation, Southwestern Legal Foundation, page 309, 324, et seq.	83
79th Congress, 2nd Session, Volume 92, Congressional Record, page 10222 (1946)	78
Report of the Committee on Public Lands, to the House of Representatives; on "Amending The Mineral Leasing Act Of February 25, 1920, As Amended," Report No. 2446, 79th Congress 2nd Session, H. Repts., 79-2, vol. 7-98.	76
American Metal Climax, Inc. (Unreported Land Department decision)	24
"Bank of America," 59 I. D. 412 (1947)	80
Hill v. Williams and Liddell, 59 I. D. 370	25
John L. McMillan, 61 I. D. 16	23
Opinion by Solicitor of Department of Interior to the Assistant Secretary of Interior dated January 12, 1945, 59 I. D. 4	23, 84
Lula T. Pressey, 60 I. D. 101	56
Richfield Oil Corporation, 65 I. D. 348	25

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 341

FLOYD A. WALLIS,

Petitioner,

versus

PAN AMERICAN PETROLEUM CORPORATION,

Respondent.

FLOYD A. WALLIS,

Petitioner,

versus

PATRICK A. McKENNA,

Respondent.

(Pan American Petroleum Corporation, Initially A Co-
Defendant With Wallis)

*ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT.*

BRIEF FOR FLOYD A. WALLIS.

A. OPINIONS BELOW.

The opinion of the United States District Court for The Eastern District of Louisiana, New Orleans Division, (R. 65) is reported at 200 F. Supp. 468. The original majority and dissenting opinions of the United States Court of Appeals for the Fifth Circuit (R. 78, 86) are reported at

344 F. (2d) 432, and, the majority and dissenting opinions on petitions for rehearing, filed on behalf of all parties, (R. 107, 114) are reported at 344 F. (2d) 439.

B. JURISDICTION.

The judgment of the Court of Appeals was dated and entered January 21, 1964 (R. 89). A timely petition for rehearing by Wallis, appellee, was filed February 10, 1964 (R. 91), and denied by order dated and entered April 20, 1965 (R. 107). The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).¹ Timely petition for writ of certiorari was filed by Wallis, July 12, 1965, and this Court granted certiorari on October 11, 1965, by Order dated October 11, 1965 (R. 134).

C. STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

Constitution of the United States:

Article I, Section 8, Clause 17:

§ 8.—The Congress shall have power . . . ,

To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which

¹ § 1254. Courts of appeals; certiorari; appeal; certified questions. Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal cases, before or after rendition of judgment or decree; * * *

the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings; * * *

Mineral Leasing Act of 1920; Act of February 25, 1920; 41 Stat. 437; 30 U.S.C. 181:

The pertinent portions of this Act are set forth in Appendix, *infra*, pp. 89-106.

Mining Law, 30 U.S.C. 26, 28; R.S. 2322, 2326:

The pertinent portions of this Act are set forth in Appendix, *infra*, pp. 106-109.

Rules of Decision Act, 28 U.S.C. 1652:

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

D. QUESTIONS PRESENTED FOR REVIEW.

In June of 1954, Wallis filed five "acquired lands" applications seeking issuance of noncompetitive oil and gas leases on Federal lands in Louisiana, pursuant to The Mineral Leasing Act For Acquired Lands (hereafter referred to as 1947 Act).²

² Act of August 7, 1947; 61 Stat. 913; 30 U.S.C.A. 351, *et seq.* As respects lands owned by the United States and the granting of oil and gas leases thereon, Congress has passed two statutes, the 1947 Act and The Mineral Leasing Act of 1920 (hereafter referred to as 1920 Act); Act of February 25, 1920; 41 Stat. 437; 30 U.S.C.A. 181, *et seq.* The distinction between the two Acts as noted (Footnotes 7 and 9, R. 67, 68) by the trial Court

(continued)

Prior to these filings, in March, Wallis and McKenna reached an oral agreement by telephone with reference to these "acquired lands" applications, and leases to be issued "under" them, which oral agreement was confirmed by a written letter agreement (Pl. Ex. "A", R. 2, 8) dated December 27, 1954.

Prior to Wallis' having filed his "acquired lands" applications, one Henry S. Morgan had filed applications for leases **under both the 1947 Act and the 1920 Act**, purporting, in each set of applications, to describe³ the same property as that in Wallis' applications. A contest in the Department of Interior ensued between Morgan and Wallis over the merits of their respective "acquired lands" applications, with Morgan's "public domain" application under the 1920 Act lying dormant. During the pendency of this contest, and on March 3, 1955, Wallis executed an option agreement (Pl. Ex. P-1, R. 33, 40) with Pan American Petroleum Corporation (hereafter called "Pan Am") granting it the option to acquire leases issued to Wallis "under and by virtue" of his "acquired lands" applications. Approximately a year later, in March, 1956, Wallis filed a

(² cont'd) is: "'Acquired land,' as the term implies, is land obtained by the United States through purchase or other transfer from a state or a private individual and normally dedicated to a specific use. Land owned by the United States by virtue of its sovereignty is called 'public domain land.' . . . The original Mineral Leasing Act of 1920, . . . , with certain exceptions not here relevant, applied only to public domain lands . . . Enacted to remedy this deficiency, the 1947 Act in terms applies only to 'acquired lands' not subject to lease under the 1920 statute . . ." *The trial Court further noted* (R. 68) that "the parties all agree" that if lands are in fact "public domain," an application under the "acquired lands" 1947 Act is "ineffective," and, *vice versa*.

³ The Department of Interior ultimately held the purported descriptions in Morgan's applications, to be faulty and not in compliance with the law.

"public domain" application for a lease on the lands under the 1920 Act, and a contest then ensued with Morgan over their respective "public domain" applications. Wallis' "public domain" application ultimately prevailed, and in December, 1958, he was issued a "public domain" lease pursuant to the 1920 Act, being Lease No. B.L.M. 042017 of the Department of Interior (R. 57).

Despite the fact that the written agreements only related to the "acquired lands" applications, nevertheless separate suits were instituted by McKenna and Pan Am seeking to impress such written agreements upon Wallis' "public domain" lease.⁴

The claim sustained below is that all issues should be decided under "applicable principles of Federal law."⁵

⁴ McKenna asserted that he and Wallis were engaged in a "joint venture" to obtain leases. He joined Pan Am as a co-defendant with Wallis, because of the execution of the option agreement (R. 40) with Pan Am.

⁵ While the issue was not raised, nevertheless Trial Judge J. Skelly Wright considered the possibility of the applicability of Federal law but concluded the case should be decided in accordance with local law and ruled in favor of Wallis in both suits. On appeal, and for the first time, McKenna and Pan Am asserted the applicability of Federal law. On original hearing, the majority of the Court ruled (Judge Wisdom dissenting) that the parties' rights should be determined in accordance with Federal law and ordered a remand for trial in accordance therewith (R. 78, 86). Primary reliance was placed upon decisions of this Court dealing with disposal of Federal lands under the Public Land Laws, particularly the case of *Irvine v. Marshall*, 61 U. S. (20 How.) 558 (1858). In denying petitions for rehearing, further written opinions (Judge Wisdom dissenting) were filed (R. 107), the majority concluding "that our opinion should be more closely tied to" the 1920 Act, and then held that the "policy" underlying the 1920 Act required "uniformity" in its application.

In the context of the foregoing, the questions presented for review are:

1. The extent to which the issues involving these private contracts, are governed by Federal law as opposed to local law, including the issues of (1) the formal validity of the private contracts, (2) the applicability of the Statute of Frauds, (3) the applicability of the parol evidence rule, (4) what constitutes a breach thereof, (5) the substantive and operative effect of the private contracts, and (6) the equitable remedies in the event of a breach of such private contracts? For while the majority acknowledged "the right of action was created by state law," yet it remanded for trial "on **all issues** under the applicable principles of federal law,"⁶

2. The extent to which the Mineral Leasing Act of 1920 requires "uniformity" in the adjudication of all issues relative to these private contracts and precludes the applicability of local law, in light of § 32 thereof (App., *infra*, p. 106), which reads in part, as follows: ". . . Nothing in this Act shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States," and

3. What interstitial authority or function is vested in Federal Courts by the Mineral Leasing Act, where Congress by § 32 of the Act (App., *infra*, p. 106) has delegated to the Secretary, authority "to prescribe necessary and proper rules and regulations and **to do any and all things**

⁶ All emphasis appearing in this brief has been supplied unless otherwise noted.

necessary to carry out and accomplish the purposes of" the Act?"

E. STATEMENT OF CASE.

For several years prior to 1954, Wallis was individually engaged in the oil business at New Orleans, Louisiana, and he set out to obtain leases on Federal lands in Plaquemines Parish, Louisiana. At the time, McKenna was working on another matter for Wallis before the Department of Interior (admitted by McKenna to be in the capacity of Wallis' agent), and Wallis instructed McKenna to check the records of the Bureau of Land Management (hereafter referred to as "B.L.M.") as to a number of tracts, to see if they were "open" for leasing. During this search, Wallis decided to concentrate on one particular tract which seemed to be "open," and set about preparing five "acquired lands" applications for leases pursuant to the 1947 Act.

In March of 1954, when the five applications were ready for filing, Wallis called McKenna and reached an oral understanding with McKenna concerning the applications and leases which might issue to Wallis "under" the said applications, with McKenna to have an interest therein. This understanding "was finally reduced to writing in a letter (R. 8) from Wallis dated December 27, 1954,

The more important subsidiary questions comprised in these questions for review are: (1) whether or not the owner of a Federal oil and gas lease has "rights" which constitute "property" and are thus subject to local law in accordance with past decisions of this Court and the Circuit Courts, including the Fifth Circuit? and (2) whether or not past decisions of this Court interpreting the Public Land Laws, generally, are applicable to the interest owned by a lessee under a Federal oil and gas lease?

approved by McKenna on January 3, 1955.”⁸ Simultaneously with the execution of this letter agreement, McKenna executed five powers of attorney agreeing to act as Wallis’ **agent** in connection with the five applications and these were filed with the B.L.M. In connection with this agreement with McKenna, McKenna testified that he had agreed to handle all matters in Washington, D. C., with the Department of the Interior and whatever agency might be involved. He further testified that it was contemplated that he would do anything necessary. In fact McKenna was not an attorney-at-law and was not even qualified to practice before the Department of Interior, for in 1952 McKenna had specifically been denied this right, all of which was unknown to Wallis.

One Henry S. Morgan had filed “acquired lands” applications for leases, **prior** to the filing of Wallis’ applications, purporting to describe the same property, and it was necessary for Wallis to initiate a contest in the Department of Interior with Morgan, by filing a “protest” as respects Morgan’s “acquired lands” applications. Although McKenna had agreed to handle all matters with the Department of Interior, he could not practice there, and so he resorted to the device of prevailing upon Wallis to employ Mastin White to handle the “protest,” on the representation that White was an “expert” and a “protest” was a very highly technical matter—with Wallis and McKenna to share in paying White’s fee for such services. Without Wallis’ knowledge or consent, McKenna told White the protest need be only “*pro forma*.” The “protest” was filed by White in January of 1955, initiating the contest with Morgan.

⁸ District Court opinion, R. 66.

In February of 1955, Wallis began to have discussions with A. D. Campbell, an employee of Pan Am, about the possibility of Pan Am's acquiring an option upon leases which might issue to Wallis, pursuant to his "acquired lands" applications. They arrived at the terms of an agreement, which were communicated to Percy Sandel, Pan Am's house counsel, with instructions to prepare an agreement, which he did, and it was executed on March 3, 1955 (R. 40). During the confecton of this transaction, Pan Am, through Sandel, had Mr. Neil Stull, its Washington, D. C., attorney and expert on B.L.M. matters, check the transaction (including Wallis' contest with Morgan) at the B.L.M.

Shortly after the execution of the Pan Am option agreement, Wallis' "protest" of Morgan's applications was denied, and Wallis appealed, within the Department, to the Director, before whom the matter was briefed and submitted. Unbeknown to Wallis, Pan Am's expert, Mr. Neil Stull, collaborated with Mr. White on the brief submitted to the Director. As respects his participation, Mr. Stull advised his client, Pan Am, that although Wallis was represented by Mr. White, yet he had had a number of conferences with White relative to the case and that White had permitted him to participate in the handling of the case and had included several suggestions made by Stull in the brief filed with the Director in support of Wallis' protest. Further, that he had reviewed White's brief very carefully and did not believe that it could be improved upon and that it met with his complete approval since he could not raise any points which had not been raised by White, and, that, accordingly, he could see no reason why Pan Am should intervene in the case. While the matter

was still pending on appeal, Mr. White had to withdraw, and Wallis employed new counsel, Mr. Harry Edelstein, a former Assistant Solicitor of the Department of Interior. Edelstein reviewed the work done by Mr. White in connection with the appeal concerning the "acquired lands" applications, and he agreed with Pan Am's attorney, Mr. Stull, that White's work could not "be improved upon," and testified there was nothing further that he could do, or did, towards prosecuting the pending appeal. However, in reviewing the records in the B.L.M. he noted that Henry S. Morgan, at the time he filed his "acquired lands" applications, had also filed "public domain" lease applications under the 1920 Act, as respects the same lands. Morgan's "public domain" applications had been lying dormant, but Edelstein suggested that Wallis also file a "public domain" application, as a precautionary matter. This was done in March of 1956, and Edelstein filed a "protest" on behalf of Wallis as respects Morgan's "public domain" applications.

In April of 1956, Wallis disassociated himself from McKenna, and advised McKenna that he was terminating his agreement with McKenna, for reasons which need not be elaborated upon.

In June of 1956, the Director, of his own motion and without notice to the parties, consolidated the contest between Wallis and Morgan as respects the "public domain" applications, with their contest over the "acquired lands" applications, thus bypassing the initial administrative level, and he then ruled the lands in question to

⁹ We need not burden this account with the dispute as to who discovered the Morgan applications, and, suggested Wallis file a "public domain" application—McKenna or Edelstein. The trial Court did not resolve the dispute.

be "public domain" lands, rejected both Wallis' and Morgan's "acquired lands" applications, and ruled Morgan's "public domain" applications defective, holding Wallis entitled to a "public domain" lease under the 1920 Act. This decision was ultimately sustained by the Secretary of the Interior,¹⁰ and the lease No. B.L.M. 042017 was issued to Wallis in December of 1958 (R. 57).

Despite the fact of the letter agreement (R. 8) between Wallis and McKenna, and, the simultaneously executed powers of attorney where McKenna had agreed to act as Wallis' agent, plus the fact that the letter agreement was restricted to the "acquired lands" applications,¹¹ McKenna filed suit alleging a joint venture agreement with Wallis, seeking to utilize parol and extrinsic evidence to maintain the joint venture and impose it upon the "public domain" lease held by Wallis.

The jurisdictional predicate for McKenna's suit was diversity of citizenship (R. 1, *et seq.*), and while McKenna prayed for declaratory relief that he had an undivided one-third interest in the Federal Oil and Gas Lease B.L.M. 042017, issued to Wallis, yet in effect he was asking for specific performance. Wallis (R. 9, 24) interposed as defenses (1) a denial of a joint venture, asserting McKenna was employed as his agent,¹² (2) the local Statute of Frauds, (3) the parol evidence rule, (4) fraud and/or a failure of consideration or lack of contractual

¹⁰ The Secretary's ruling was affirmed by the Court. *Cf. Morgan v. Udall*, 306 F. (2d) 799, and writ was refused, 371 U. S. 941.

¹¹ The trial Court said: "Indeed, Wallis' letter to McKenna which embodies their agreement, traces almost literally the language of McKenna's prior letter requesting written confirmation of his interest." R. 72, footnote 18.

¹² The trial Court did not deem it necessary to decide this issue. R. 67, footnote 4.

capacity, all based upon McKenna's agreement to handle all matters with the Department of Interior where it was contemplated that McKenna would do anything necessary, whereas McKenna could not and did not render such services, since he was not admitted to practice before the Department.¹³

Despite the fact that the option agreement with Pan Am (R. 40) was restricted to the "acquired lands" applications and leases which might issue to Wallis "under and by virtue of" **these applications**, Pan Am brought suit for specific performance of the option agreement (R. 32), seeking to impose it upon Wallis' "public domain" lease, the jurisdictional predicate for its suit being diversity of citizenship. In attempting to maintain its claim, Pan Am (1) placed emphasis upon Paragraph II of the option agreement (R. 40) and its provision concerning "diligent efforts,"¹⁴ (2) relied upon an alleged contemporaneous conversation between Wallis and Pan Am's house counsel, Sandel, at the time of the signing of the option agreement, supposedly concerning Morgan's "public domain" applica-

¹³ The trial Court did not deem it necessary to decide this issue. R. 74, footnote 24.

¹⁴ The trial Court said: "Much is made of a second paragraph of the option agreement where Wallis promises, in general terms, to 'make diligent efforts' to obtain a lease over the lands covered by the applications. But that provision does not purport to enlarge the scope of the grant. (footnote) . . . Standing alone, this provision would convey nothing. It merely imposes an additional duty, supplementing the fundamental obligation recited in the first paragraph. Nor does it throw light on the subject matter of the contract. On the contrary, being a mere accessory stipulation, its apparently general terms must be considered qualified by paragraph I, which indicates precisely 'the things concerning which * * * the parties intended to contract.' . . . R. 72.

tions,¹⁵ and (3) urged some type of estoppel based upon the "diligent efforts" provision of the option agreement coupled with the assertion that Wallis did not take a definitive position before the Department as to the character of the land.¹⁶

Wallis defended (R. 45, 50) by (1) denying that the option agreement covered his "public domain" lease, (2) asserting the local Statute of Frauds, and the parol evidence rule, (3) urging that Pan Am had not elected to exercise the option agreement in writing, as required by the Statute of Frauds, (4) asserting the option agreement was not binding, because (a) the consideration or "price" for a conveyance to Pan Am was "uncertain" since it could be altered at Wallis' option and (b) Wallis could elect to reserve an "oil payment" out of production, and there would, therefore, be no "consideration" since Wallis would be simply purporting to "reserve" what he had, and (5)

¹⁵ The trial Court refused to believe Sandel, and held no such conversation took place, saying "Though Campbell, the Pan American agent who negotiated the option 'deal' with Wallis, makes no such claim, Sandel, the attorney who drafted the contract, insists that paragraph II of the contract was inserted, *inter alia*, to cover the contingency that a public domain lease might be issued to Wallis, after the latter alerted him to that possibility by mentioning that Morgan had filed both types of application. But all the evidence, *including Sandel's own correspondence*, contradicts that assertion. Moreover, it is difficult to understand why the draftsman was not more explicit if apprized of the contingency and intending to provide for it. Under the circumstances, the allegation must be rejected . . ." R. 72, footnote 18.

¹⁶ In light of the statement of its own attorney and expert, Mr. Stull, to the effect that he had participated in the prosecution of Wallis' "acquired lands" application, and appeal thereon, and did not believe it could be improved upon, Pan Am was never able to show where Wallis failed to make "diligent efforts."

interposing two defenses based upon the Mineral Leasing Act, and the regulations issued thereunder.¹⁷

District Judge J. Skelly Wright ruled in favor of Wallis in both cases, holding the written contracts, in each instance, were restricted solely to the "acquired lands" applications and did not encompass the "public domain" lease. Moreover, Judge Wright heard **all** parol and extrinsic evidence, and held that it merely confirmed the written agreements that the parties had only intended to contract with reference to the "acquired lands" applications;¹⁸ but Judge Wright ultimately rejected all parol and extrinsic evidence, under the parol evidence rule and the local Statute of Frauds. Despite the fact that the case was tried, argued and submitted by Pan Am and McKenna, based upon the applicability of local law, yet Judge Wright considered the question of the applicability of Federal law, but concluded that local law was controlling.

On appeal, and for the first time, McKenna and Pan Am asserted the applicability of Federal law, and the Court of Appeals reversed (R. 78) Judge Wright, by a divided vote, and "remanded for re-trial upon the evidence already taken and any additional relevant evidence, and for full and complete findings of fact and conclusions of law on all issues under the applicable principles of federal law." Circuit Judge Wisdom filed a written dissent (R.

¹⁷ Defenses (3) through (5) were not passed upon by the District Court. R. 74, footnote 24.

¹⁸ Said the trial Judge: "... The conclusion must be that the written agreements faithfully record what was in the minds of the parties. Accordingly, there is no pretext for a strained construction or for reformation of the instruments. These instruments, taken alone or illumined by parol evidence, limit the claims of McKenna and Pan American to the acquired lands applications." R. 72.

86) agreeing with Judge Wright.¹⁹ In denying petitions for rehearing, the majority handed down a further written opinion (R. 107) with Judge Wisdom filing a further written dissent (R. 114).

The majority opinion, on rehearing, represented a decided shift in the predicate upon which its original opinion rested, if not a repudiation thereof. The original opinion was founded, in the main, upon decisions by this Court relating to the disposal of **land** under the Public Land Laws, with particular emphasis placed upon the case of *Irvine v. Marshall*, *supra*. It made only a passing reference to two sections of the 1920 Leasing Act, coupled with the observation that the Act "makes it clear that, as part of the public policy . . . directed at opposing monopoly . . . the Bureau of Land Management must examine the qualifications of the real lessee and of any assignee of a mineral lease . . . Those provisions leave no room for operation of any State law."

On rehearing, when confronted with numerous other decisions by this Court dealing with the Public Land Laws, which destroyed the predicate for the original opinion, the majority "concluded that our decision should be more closely tied to that [1920 Leasing] Act," although it did not expressly repudiate the prior reliance upon the *Irvine* case, *supra*, and the other decisions initially relied upon.

¹⁹ In view of the importance of the question involved concerning Federal-State relationship, it is noteworthy that, below, each disposition of the basic question won the vote of one circuit Judge and one district Judge.

This Court granted certiorari (R. 134), inviting the Solicitor General to file a brief expressing the views of the United States.

F. SUMMARY OF ARGUMENT.

This private dispute over the ownership of a Federal oil and gas lease does not involve the United States, since the lease duly issued to Wallis. While the United States has no interest in the outcome of this case, yet due to the large number of outstanding Federal leases, as noted in *Boesche v. Udall*, 1962, 373 U. S. 472, 484, the decision in this case will be of major importance. For if the decision below is allowed to stand, it is bound to adversely affect the title of private parties to many such leases which have heretofore been transferred by the original lessees.²⁰

I.

The threshold argument, of necessity, is the fact that where a possible Federal-State conflict is suggested, as to the law applicable to a private transaction, it is the intent of Congress that determines the applicable law. This Congress has done in favor of local law, by the "proviso" of § 32 (App., *infra*, p. 106) of the Mineral Leasing Act, to the effect that: "Nothing in this Act shall be construed or held to affect the rights of the

²⁰ The original majority opinion below rested almost entirely upon an erroneous application of decisions by this Court dealing with the Public Land Laws, generally. When this error was pointed out on rehearing, the majority did not expressly repudiate the first opinion, but shifted emphasis to the Mineral Leasing Act and its "policy" against "monopolies." In doing so, it relied, in the main, upon an erroneous interpretation of this Court's decision in the *Boesche* case, *supra*. Because of the foregoing, the argument presented herein is required to deal with both such opinions.

States . . . to exercise any rights which they may have . . .” Section 32 is more than a sufficient *indicia* that Congress intended local law should control. The majority below acknowledged (R. 113) that the transaction here involved well might “constitute transactions essentially of local concern.” But aside from this proviso, the decisions of this Court dealing generally with this question, establish the guideline to be followed in the resolution of such a suggested conflict, **as the observance of a fair accommodation between State and Federal authority, if a reasonable opportunity is afforded the protection of the Federal interest.** Such cases show that this is not a case requiring the applicability of Federal law, although such cases serve to “point up” and emphasize the controlling effect of the proviso of § 32.

II.

One who holds a validly issued Federal oil and gas lease, has a “right” or “interest” which is “property” in the fullest sense of the word, particularly as respects private parties, and local law governs and controls **private transactions or contracts** had in connection therewith, all so long as there is no contrary Federal statutory provision, or, regulation issued by the Secretary of the Interior, which intrudes upon the matter. This is particularly true where Congress has provided, as in this case, for the protection and safeguard of any possible Federal interest. This has been the consistent administrative policy of the Secretary, and the decisions of the Courts interpreting the Act are in accord. The *Boesche* case, *supra*, does not warrant a contrary conclusion.

III.

The Mineral Leasing Act is but an evolvement, or outgrowth, of the Public Land Laws, generally, and even if the *Boesche* case, *supra*, is subject to an interpretation or construction, that in the case of a Federal Oil and gas lease, and, because the United States has not parted with "title" to the land, the lessee does not have a "property" right in the fullest sense of the word, nevertheless under the decisions relating to such Public Land Laws and **as respects third persons and private transactions with them**, the Federal lessee (1) has "rights," which constitute "property," and are thus subject to local law, so long as local law is consistent with (a) the fact that "legal" title to the land is vested in the United States, and, (b) the Acts of Congress relative thereto; (2) such "rights" constitute "property" in the same sense that other inceptive "rights" acquired by individuals pursuant to the Public Land Laws, generally, constitute "property," even though the legal title is vested in the United States; and (3) the decisions and jurisprudence relating to inceptive "rights" acquired pursuant to the Public Land Laws, generally, are equally applicable to such "rights" acquired pursuant to the Leasing Act. In interpreting the Leasing Act, the Land Department, a decision of this Court, and, numerous decisions by the Courts of Appeal (including the Fifth Circuit), have cited and followed decisions arising under the Public Land Laws, generally, and have applied the principles established thereby.

IV.

The cases dealing with the Public Land Laws, generally, with respect to those who have inceptive "rights" in public land pursuant thereto, hold that even though

the "legal" title to the land is vested in the United States, nevertheless, **as respects all but the United States**, the holder of such rights (1) may treat the land as his own, and (2) is the lawful possessor of the land, clothed with an inceptive title, and the policy of Congress has been to leave the protection of such rights to local law, relegating him to availing himself of the same rights that are open to others holding lands, by title absolute or inchoate. Clearly, those who hold validly issued Federal leases, **do not enjoy a lesser status or less rights**, and this policy of Congress which inheres in the Public Land Laws, generally, is also applicable to the Leasing Act.

V.

The cases interpreting the Public Land Laws, generally, clearly delineate the extent of the jurisdiction of Federal Courts, in both actions at law and in equity, to apply Federal law as respects those who have acquired lands from the United States. Such cases hold that in order for an individual to impose an "equitable trust" upon a legal title issued by the Government, he must (1) predicate his claim upon (or derive it from) dealings with the Land Department, and (2) show that under **Federal law** the Land Department should have awarded the legal title to him, instead of the other. In the absence of such a showing, and particularly in this case where these respondents had no dealings with the Land Department, but their claims are **through Wallis**,²¹ there is no jurisdiction to apply Federal law. This Court has applied these cases and the principle enunciated, to one holding a Federal lease, and the decisions of the Courts of Appeal are to the same effect.

²¹ This was acknowledged by the majority below (R. 108).

VI.

Since the inception of the Leasing Act over forty years ago, the Courts of Appeal (including the Fifth Circuit) have consistently held (including a decision rendered while this case was pending on rehearing) that one who has acquired a lease under the Leasing Act (**as respects third persons and private transactions**) is in a position entirely analogous to one who holds a Federal patent to land. Many of these same cases have squarely held that local law is applicable to private transactions relating thereto. We submit that a decision of this Court embodies these same principles, and, this has been the policy of the Land Department.

The decision below, being the single instance of a conflict in the jurisprudence and coming at this late date (approximately 45 years), if allowed to stand, would necessarily "cloud" many titles to Federal leases heretofore issued and subsequently transferred. Particularly is this true when consideration is given to the fact that decisions of the Ninth and Tenth Circuit (where the bulk of the Federal lands are situated) have most clearly and consistently announced the principles so set forth. Additionally, and as respects future dealings with such leases, it casts them into the vacuum of a vague and, as yet, wholly undefined system of a "Federal law of titles."²² Due regard for a policy directed at the stability of titles, denies affirmance of the decision below.

²² In the words of Judge Wisdom, ". . . if a federal court, in the name of interstitial lawmaking, may concoct a Law of Property, Law of Contracts, Law of Restitution, and, perhaps, a Law of Descent and Distribution for Mississippi Mud-Lumps, I foresee a fashioning of some fancy legal systems for a great many federal enclaves within the borders of the states."

VII.

There is no "duty" imposed upon the "federal courts" to see that "the equitable title as well as the legal title to public lands" is properly vested, where such "equitable title" **is not** derived from dealings had with the Land Department, for Congress alone has exclusive authority to determine how and in what manner public lands, or rights thereto, are disposed of. Congress has designated the Secretary of the Interior and the Land Department as the vehicle for such disposal. Having, by § 32 (App., *infra* p. 106) of the Leasing Act, delegated authority to the Secretary to "prescribe . . . regulations . . . and to do any and all things necessary to carry out and accomplish the purpose" of the Act, to the extent the Act vests interstitial authority, it is vested in the Secretary, not the Courts.

VIII.

The decision below (in the words of dissenting Judge Wisdom) finds merely the "presence of a federal statute," plus a "policy" furthered by the statute, and then simply **concludes** that "uniformity" is **required** as respects the adjudication of all private disputes. At no place does the opinion demonstrate how, or why, the adjudication of such private transactions **in accordance with local law** in any way relates to, or has any connection with, the "policy" of the Act, or would affect the interests of the United States. Nor does it show or demonstrate how, or why, **uniform adjudication** of such private rights would relate to, or have any connection with, the "policy" of the Act, or the interests of the United States. This conclusion is contrary to the action of the Secretary in administering the Act.

IX.

The conclusion by the majority below, that: "It is clear that the . . . Act recognizes the devices of 'assignments' and 'options' as concomitants of the" policy of the Act, is totally without foundation. To the extent that these devices have any relationship to the policy of the Act, Congress, by the very terms and provisions of the Act, has provided the necessary safeguards. This conclusion is contrary to the administrative interpretation of the Secretary, and, is contrary to the decisions of the Courts of Appeal (including the Fifth Circuit), for they have attached no significance thereto.

This conclusion with respect to "assignments," is further contrary to the legislative history of the Act, particularly the 1946 amendment thereto which incorporated § 30 (a) (App., *infra*, p. 104) into the Act. As respects "options" the conclusion is unsound, when consideration is given to the situation which prevailed, and, the administrative practice in connection therewith, all of which brought about and gave rise to the 1946 amendment and statutory recognition of "options," and, the statutory regulation and requirements in connection therewith.

G. ARGUMENT.

I. The Decision Of The Majority Below Is Contrary To The Secretary's Administrative Interpretation And Application Of The Leasing Act.

In granting certiorari this Court invited the Solicitor General to file a brief expressing the views of the United States. Accordingly, at the outset, we shall devote some attention to the administrative interpretation and application of the Leasing Act by the Secretary of the In-

terior, particularly in light of the fact that the decision below is contrary thereto.

In the administration of the Leasing Act, it has been the Land Department's interpretation thereof, that the granting of a Federal oil and gas lease vests the lessee with a property right and estate for years in real property, that the holder of such a lease has an immediate leasehold interest in the land,—in short, a lease conveys an interest in the land. In an opinion by the Solicitor of the Department of the Interior, dated January 12, 1945, and addressed to the Assistant Secretary of Interior, 59 I. D. 4, this statement appears at page 6:

“ . . . Accordingly, despite some similarity, prior to discovery, in the characteristics of a lease and a prospecting permit—such as their both being subject to cancellation for cause—it was concluded that leases were, in effect, of a more permanent nature and **vested the lessees with a property right and estate for years in real property. The rule adopted was said to be ‘consistent with the purpose and intent of the leasing law.’ ”**

and at page 10:

“ . . . On the other hand, a holder of a non-competitive lease has **an immediate leasehold interest** in all of the lands subject to the lease for 5 years and a preference right to a new lease thereof prior to discovery and the right, without more, immediately upon discovery, to produce and sell any oil or gas produced . . . ”

In accordance therewith, in the decision of *John L. McMillan*, (A-26365, 1952) 61 I. D. 16, this statement appears

at page 18: "In the first place, an oil and gas lease under Section 17 of the Mineral Leasing Act conveys an interest in land . . ." And as recently as September 30, 1958, in an unreported decision by the Director of the Department, approved October 8, 1958 by the Assistant Secretary of the Interior, *American Metal Climax, Inc.* (Colorado 0318, etc.), the following statement appears:

"This argument overlooks the fact that an oil and gas lease conveys an interest in land. *John L. McMillan*, 61 I. D. 16 (1952). An assignment also is such a conveyance. A valid conveyance of an interest in land can be made only in the manner prescribed by the law of the place where such land is situated. *Munday v. Wisconsin Trust Company et al.*, 252 U. S. 499 (1920). Hence an interest in land can be transferred by operation of law only by the law of the State where the land is. Section 223, Restatement of the Law of Conflict of Laws. A merger of corporations outside of the State of Colorado cannot affect the ownership of interests in land within the State, unless the laws of Colorado are complied with."²³

This then has been the administrative interpretation of the Act, and such interpretation concludes that the federal lease (1) "conveys an interest in land," and (2) transfers thereof can only be made in accordance with the law of the *situs* of the land—local law. This second conclusion necessarily follows from the first, in accordance with this Court's decision in *Wilcox v. McConnell*, 1839, 38 U. S. 498, 516, *to-wit*:

²³ For the convenience of the Court, a copy of this decision is being filed with the Clerk of this Court.

"... but that whenever, according to those (United States) laws, the title shall have passed, **then that property, like all other property in the state, is subject to the state legislation . . .**"

Against the background of the foregoing interpretation of the Act by the Land Department, and consistent therewith, where disputes have arisen between private parties as to whether or not a private transaction operates to transfer a Federal lease, and such dispute has been presented to the Land Department, it has declined to resolve the dispute, referring the parties to the Courts. Thus in *Hill v. Liddell*, 59 I. D. 370 (1947), as respects a dispute arising out of a *private contract with a lease owner*, this statement is made, page 375:

"... Moreover, the dispute between Hawkins on the one side and Liddell and N. S. Williams on the other side, each charging the other party with having breached the terms of their agreement of August 21, 1944, is a matter which could and should more appropriately be settled either between the parties or by suit in the courts, rather than by this Department . . ."

Richfield Oil Corporation (A-27603, 1958), 65 I. D. 348, involved a dispute over the interpretation of a contract, one party asserting that it operated as "assignments" of the Federal oil and gas leases and the other asserting that it operated as "subleases in the nature of operating agreements," and the opinion states, at page 354:

"... Obviously, the parties disagree as to the nature of the instruments. In like circumstances **it has**

been the traditional position of the Department that matters of private contract dispute are for the parties and the courts, not the Department, to decide. See *John H. Corridon*, A-27390 (February 18, 1957) and cases cited therein."

The foregoing has been the administrative interpretation of the Leasing Act,²⁴ and we shall hereafter demonstrate, that the Court decisions have been in accordance therewith. Moreover, Congress has amended the Leasing Act more than a dozen times in forty years, as it relates to oil and gas leases,²⁵ and, in the course thereof, Congress gave specific attention to § 30, dealing with "assignments" of leases, when in 1946 it added § 30 (a) to the Act. Congress is bound to have been aware of this administrative interpretation of the Act, and the Court decisions consistent therewith, and, yet, it has taken no steps to change or alter them. In fact, as we demonstrate here-

²⁴ In *McLaren v. Fleischer*, 256 U. S. 477, 480-481, it was held: "In the practical administration of the act the officers of the land department have adopted and given effect to the latter view. They adopted it before the present controversy arose or was thought of, and except for a departure soon reconsidered and corrected, they have adhered to it and followed it ever since. Many outstanding titles are based upon it and much can be said in support of it. If not the only reasonable construction, it is at least an admissible one. It therefore comes within the rule that the practical construction given to an act of Congress, fairly susceptible of different constructions, by those charged with the duty of executing it is entitled to great respect and, if acted upon for a number of years, will not be disturbed except for cogent reasons."

²⁵ See Act of April 30, 1926, 44 Stat. 373; Act of July 3, 1930, 46 Stat. 1007; Act of March 4, 1931, 46 Stat. 1523; Act of Aug. 21, 1935, 49 Stat. 674; Act of Aug. 26, 1937, 50 Stat. 842; Act of Aug. 8, 1946, 60 Stat. 950; Act of June 1, 1948, 62 Stat. 285; Act of Sept. 1, 1949, 63 Stat. 682; Act of July 29, 1954, 68 Stat. 583; Act of Aug. 2, 1954, 68 Stat. 648; Act of Sept. 21, 1959, 73 Stat. 571; Act of Sept. 2, 1960, 74 Stat. 781.

after, the 1946 amendment, which added § 30 (a) to the Act, fortifies this interpretation and is entirely in keeping therewith. In light of these considerations, it cannot be denied that many outstanding titles are based upon the foregoing administrative and Court interpretations of the Act. We submit that the decision below is contrary to the foregoing, and a proper regard for stability of titles requires its reversal.

In conclusion, we will state that even if the Court should conclude that the administrative interpretation of the Act is in error, as respects the nature of the interest granted by a Federal oil and gas lease, nevertheless the other administrative interpretation and application of the Act, as respects disputes between private individuals, is still proper and correct, as we shall demonstrate hereafter.

II. The Comprehensiveness Of The Mineral Leasing Act, And, The Alleged Need For Uniformity—As Opposed To The Proviso Of Section 32 Of The Act Reserving The Right To The States "To Exercise Any Rights" Which They May Have.

We baldly assert that the second opinion of the majority below, holding there is a need for "uniformity" in the law applicable to these private transactions, is rendered entirely in error because of the express Congressional prohibition found in § 32 of the Leasing Act (App., *infra*, p. 106), that "**nothing** in this Act shall be **construed or held** to affect the rights of the States . . . to exercise any rights which they may have . . ." The second opinion holds that the Leasing Act "represents a comprehensive

scheme of federal regulation" and that this required the conclusion that "the interest of the United States is directly affected" by the law applicable to these private agreements. Said the majority, "uniformity" in the law applicable is required and there is no room for the applicability of local law. Yet the majority opinion does not point out wherein the applicability of local law would or might conflict with any express statutory provision, or regulation issued pursuant thereto by the Secretary of the Interior. The decision is pitched solely upon the requirement of "uniformity" which, in some obscure fashion, it relates to the "policy" of the Act. This conclusion is contrary to the administrative interpretation of the Act by the Secretary.

The second opinion only referred to that portion of § 32 of the Act which grants the Secretary authority to administer the Act, and, prescribe rules and regulations to accomplish the purposes of the Act. The second opinion gives absolutely no consideration to the further proviso of § 32, above noted, and, we submit, that this provision was entirely overlooked. We further submit that this provision entirely precludes the conclusion of the second opinion.

It will be noted that this proviso is drawn in the broadest terms for it precludes not only "construction" of the Act, but in addition prohibits any **provision of the Act** from denying the rights of the States "to exercise any rights which they may have." This broad grant includes the further proviso as respects the rights of the States, as "including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States." The all-encompassing language of the entire proviso has never been

interpreted by this Court. However, it has had occasion to interpret the above quoted "included" authority to tax, in the case of *Mid-Northern Company v. Walker*, 268 U. S. 45 (1924). In that case an effort was made to restrict, by interpretation, the all inclusiveness of the "included" right to tax. However, this Court rejected such effort to limit and circumscribe the proviso, saying, p. 49: ". . . In other words, **the purpose of Congress** was to remove **altogether** from the field of controversy, **among other questions**, the very question which is here presented, and to put beyond doubt the authority of the states to impose taxes upon lessees in respect of their property, . . ., **without regard** to the origin thereof or **to the interest of the United States in the lands or leases.**"

In connection with this extract, we wish to emphasize the fact that it interprets this proviso as respects a mineral lessee, as subordinating the "interest of the United States in the lands or leases" to the exercise of local right and authority. The opinion concludes with this statement (p. 50): ". . . We think the proviso **plainly discloses the intention of Congress** that persons and corporations contracting with the United States under the act, should not, for that reason, be exempt from any form of state taxation otherwise lawful." While in keeping with the questions there presented, this last statement by the Court is restricted to "any form of state taxation," if we substitute for this restriction, the all-encompassing language of the whole proviso, it would read that persons and corporations holding leases under the Act "should not, for that reason, be exempt from any form of the exercise of any rights or authority of the States otherwise lawful."

What are the "rights of the States," the exercise of which, the Act shall not "be construed or held to affect . . ."?²⁶ We need look no further than the second opinion when it says: "... federal law did not create the right of action . . . * * * It might be said that the absence of a congressional definition of 'option' and 'assignment'—whether they be oral or arise by operation of trust—implies that we should look to the law of the state. * * * While it might be said that [these claims] constitute transactions **essentially** of local concern and that the resulting litigation is 'purely between private parties,' . . . * * * We do not think the use of these devices as a part of the scheme of carrying forth this public policy **should be limited by interstitial restrictions imposed by the law of the State of Louisiana . . .**"

In addition to the foregoing, the second opinion says, "the action is not one under federal law in the sense that federal law did not create the cause of action," and when this is coupled with the further statement, "federal law did not create the right of action," it necessarily acknowledges that such was created under local law. Being a State-created cause of action, is not one of the "rights of the State," the right to have that cause of action and all issues, including the remedy, governed and controlled by State

²⁶ Consider this proviso of Section 32 in light of what was said in *Davies Warehouse Co. v. Bowles*, 321 U. S. 144, 155 (1943): "It is a much more serious thing to adopt a rule of construction, as we are asked to do here, *which precludes the execution of state laws by state authority in a matter normally within state power*. The great body of law in this country which controls acquisition, transmission, and transfer of property, and defines the rights of its owners in relation . . . to private parties, is found in the statutes and decisions of the state. The custom of resorting to them to give meaning and content to federal statutes is too old and its use too diversified . . ."

law?²⁷ We need not pause to consider the incongruity of the acknowledgment in the second opinion that the right and cause of action were State-created, with its decision that the case be remanded for trial "on **all** issues under the applicable principles of federal law." *Francis v. Southern Pacific Co.*, 333 U. S. 445 (1945), which the second opinion cites and relies upon, did not pretend that Federal law governed **all** issues in the case. A mere reading of the *Francis* case discloses that in that case recovery might have been had under local law but for Federal law, and it illustrates a situation where the "rights of the State(s)" would have precluded the applicability of Federal law, had the statute there in question contained a proviso similar to that in § 32 of the Leasing Act.

We submit that the proviso of § 32 unqualifiedly precludes the "federal courts' responsibility to develop federal common law in aid of the uniform implementation and protection of federal interest" as respects the Leasing Act, and contrary to the holding of the second opinion in this respect.²⁸

²⁷ The State has not ceded jurisdiction over the lands in question, nor was jurisdiction reserved when the State was admitted to the Union (Cf., Act of Feb. 20, 1811, and, Act of April 8, 1912), and when this proviso of Section 32 is considered in light of Article 1, Section 8, Clause 17 of the Constitution (*Supra*, p. 3), and, this Court's decisions in *Wilson v. Cook*, 327 U. S. 474 (1945), and *Paul v. U. S.*, 371 U. S. 245 (1963), the applicability of local law to these private transactions, simply cannot be denied.

²⁸ In *U. S. v. Certain Property, etc.*, 306 F. 2d 439 (C. A., 2nd, 1962), the Court said: "Persons dealing in land within a state must conduct themselves in the light of the state law, which will inevitably govern most of their relations; it would be inconvenient in the last degree if they had also to take cognizance of a Federal property law that would apply only in [a] rather rare event . . ."

Without regard to this provision of § 32 of the Act, and based solely upon the decisions of this Court which deal generally with the question of what law controls,—Federal or State, such cases disclose that this is not a case which requires the applicability of Federal law. Yet, when these cases are considered in light of this provision of § 32, they serve to emphasize the glaring error which is inherent in the decision below.

Any consideration of these cases should commence with *Radio Station WOW v. Johnson*, 326 U. S. 120, (1944), where this Court held that a judgment under local law impinged upon the prerogatives of the Federal Communications Commission, by attempting to control the conduct of parties before that Commission, but said, p. 132: "On the other hand, if the State's power over fraud can be effectively respected while at the same time **reasonable opportunity** is afforded for the protection of that public interest which led to the granting of a license, the principle of fair accommodation between State and federal authority, where the powers of the two intersect, **should be observed.**" Nowhere does the second opinion demonstrate that a "reasonable opportunity is **(NOT)** afforded for the protection of (the) public interest," as respects the Leasing Act, because of the applicability by the Trial Court of "the State's power over fraud" as it is epitomized by the local Statute of Frauds.

Farmers Union v. WDAY, 360 U. S. 525 (1958), states, p. 535: ". . . But we have not hesitated to abrogate state law where satisfied that its enforcement would stand 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' Here, petitioner is asking us to attribute to § 315 a meaning which would

either frustrate the underlying purposes for which it was enacted or alternatively impose unreasonable burdens on the parties governed by that legislation. **In the absence of clear expression by Congress we will not assume that it desired such a result . . .**" This extract calls for a "clear expression by Congress,"²⁹ and we submit that § 32 of the Act is such a "clear expression by Congress."³⁰ We, of course, do not concede that the applicability of local law to these private transactions would either frustrate the

²⁹ In *Paul v. U. S.*, 371 U. S. 245 (1963), this Court said, at page 250: "If there had been a desire to make federal procurement policy bow to state price-fixing in face of the contrary policy expressed in the Regulation, we can only believe that the objectives of the Act would have been differently stated . . ."

³⁰ As to what constitutes a "clear expression by Congress," we direct the Court's attention to the recent holding by the Fifth Circuit, in an opinion *authored by the same Judge* as the two opinions below, and rendered while these cases were pending on rehearing. We refer to *The Leiter Minerals, Inc. v. U. S.*, 329 F. 2d 85 (1964), which involved a contract *whereby the United States purchased land*, said the Court, p. 89: "In addition, section 715f of the Migratory Act reads: 'No deed or instrument of conveyance shall be accepted by the Secretary of the Interior under sections 715-715d, 715e, 715f-715k, and 715l-715r of this title *unless the State in which the area lies shall have consented by law to the acquisition by the United States of lands in that State.*' (Emphasis by the Court.) We have no doubt that the Congress could make federal law applicable, but we are equally clear that it had no intention to do so when it merely authorized the contract by which the United States acquired the property. *State law must govern in the absence of a federal statute making federal law applicable . . .*" This case was compromised while pending on application for writ of certiorari, and pursuant to motion of the parties the writ was granted, an order entered vacating the decision of the Fifth Circuit, and the case was remanded with directions to dismiss the suit. *U. S. v. The Leiter Minerals, Inc.*, 381 U. S. 413. In view of this disposition, we recognize that the decision of Leiter has no efficacy as a judicial precedent. We allude to the decision herein simply because it illustrates the fact that the organ of the court below was entirely aware of the proper basic principle that should have been applied to this case.

purpose of the Leasing Act, or, impose unreasonable burdens on the parties governed thereby, and nowhere does the second opinion so demonstrate.

Similarly, in *Sola Electric Co. v. Jefferson Electric Co.*, 317 U. S. 173, this statement appears at p. 176: "It is familiar doctrine that the **prohibition of a federal statute** may not be **set at naught, or its benefits denied**, by state statute or state common law rules. **In such a case** our doctrine is not controlled by *Erie R. Co. v. Tompkins* . . ." The majority below did not point out any "prohibition of a federal statute . . . set at naught, or its benefits denied," by the decision of the Trial Court. On the other hand, this extract demonstrates why § 32 of the Leasing Act is applicable to the case at bar, when considered in light of the facts involved in *Sola*. It shows that where the cause and right of action asserted are created by local law based upon contract, then under local law the defense of estoppel is a good defense, **but for** "the prohibition of a federal statute." In the case here involved the majority reversed because of the Leasing Act—some unspecified requirement of the "policy" of the Act. Yet the Leasing Act (§ 32) provides that "nothing in this Act shall be construed or held to affect the rights of the States . . . to exercise any rights which they may have . . ." We submit that a "right" of a State is to have its "public policy" as evidenced by its laws, applicable to, and dispositive of, a State-created cause and right of action. *Sola* acknowledges that such would be the case, **but for** the "prohibition" of a federal statute, yet § 32 of the Act says that Act shall not be held or so construed to operate.

The majority opinion cited no authority in support of its conclusion that "uniformity" is required as respects

the applicability of local law to these private transactions, but **only suggested** that its conclusion be **compared** with the decision in *Bank of America National Trust & Savings Assn. v. Parnell*, 352 U. S. 29 (1956).³¹ The holding in that case that Federal Law was **not applicable** to the private transaction there involved, was summarized by this Court as follows: ". . . because the litigation between the two private parties there did not intrude upon the rights and the duties of the United States, the effect on the only possible interest of the United States—the floating of securities—being too speculative to justify the application of a federal rule. That doctrine clearly does not apply when the State fails to give effect to a term or condition under which a federal bond is issued, as the Court there noted . . ."³² Nowhere does the second opinion point out wherein the applicability of local law to these private transactions has failed to "give effect to a term or condition" under which this federal lease was granted, nor to give effect to any provision of the Leasing Act or any regulation issued thereunder. For in the final analysis, local law as here applied, was entirely negative, in that it simply said that as a result of this private transaction, the status of this federal lease **was in no way altered**. The majority opinion did not pretend that local law as here applied, would affect the "floating" of Federal leases. The Secretary does not consider that the applicability of local law to private transactions involving transfers of Federal leases in any way affects the interests of the United States, nor does he con-

³¹ In the recent case of *Bolack v. Underwood*, 340 F. 2d 816 (C. C. A 10th, 1965), in a dispute between private individuals over the ownership of a Federal lease, the Court specifically cited *Bank of America* in support of the holding, that "no right of the federal government is involved, state law governs."

³² *Free v. Bland*, 369 U. S. 663, 669 (1961).

sider uniformity in the law applicable to such transactions necessary, *supra*, pp. ~~98~~²², *et seq.* *Bank of America*, as it relates to the question of Federal Courts developing or creating "federal common law," was placed in proper focus by the recent decision of this Court in *Wheeldin v. Wheeler*, 373 U. S. 647 (1962), when this Court said, at page 651:

"... As respects the creation by the federal courts of common-law rights, it is perhaps needless to state that we are not in the free-wheeling days antedating *Erie R. Co. v. Tompkins*, 304 U. S. 64. **The instances where we have created federal common law are few and restricted.** In *Clearfield Trust Co. v. United States*, 318 U. S. 363, we created federal common law to govern transactions in the commercial paper of the United States; and we did so in view of the desirability of a uniform rule in that area. *Id.*, p. 367. **But even that rule was qualified in *Bank of America v. Parnell*, 352 U. S. 29 . . .**"

In *San Diego Unions v. Garmon*, 359 U. S. 236 (1959), at page 241, this Court said: "In determining the extent to which state regulation must yield to subordinating federal authority, we have been concerned with delimiting areas of potential conflict; potential conflict of rules of law, of remedy, and of administration . . ." The majority opinion below, in disregard of, and contrary to, past decisions of this Court and those of the Circuit Courts, including the Fifth Circuit, makes absolutely no effort to differentiate among "conflicting rules of law, of remedy, and of administration." No effort is made at "delimiting areas of potential conflict," or consideration given to matters of "a merely peripheral concern." On the contrary, in one fell swoop, it wipes the slate clean **of any area** for the

exercise of local law, by requiring the application of Federal law to **all issues**.

As we view the opinions below, the Court's acknowledgment that the right and cause of action here involved are locally created, thereby removes these cases from the "full sweep" of the doctrine of *Textile Workers v. Lincoln Mills*, 353 U. S. 448 (1956). Yet without so stating, it attempts to take advantage thereof, by speaking of the comprehensiveness of the Leasing Act. But this disregards several important factors. The Leasing Act, to the point of granting leases on Federal lands, is no different and no more "comprehensive" than any of the other general Public Land Laws. The only real difference results simply from the nature of the "right" granted, and, more particularly, the situation contemplated **after the "right"** in the Federal land **is granted**. This results from the fact that a lease is a continuing executory contract, which continuously generates rights in favor of the lessor, the United States. Thus when this Court noted, in the *Boesche* case, that the Leasing Act "has also subjected the lease to exacting restrictions and continuing supervision by the Secretary," it was speaking in the main **of the supervision of the lessor's rights under the lease**, and, of the operations conducted under the lease in accordance with the terms of the lease, all as distinguished from the **ownership of the lease itself**. On this aspect of the matter, the ownership of the lease, there is nothing "restrictive," for while an "assignment" or "sublease" must be approved by the Secretary, yet he has no discernible discretion, since under § 30 (a) (App., *infra*, p. 103), he may "disapprove" **for only two specific reasons**. This, we submit, should be contrasted with what was said in the *San Diego Union* case, *supra*, concern-

ing the labor laws, and more particularly the administration thereof by a "centralized administrative agency."³³

The Public Land Laws, generally, have always provided for administration thereof, by the Secretary of the Interior. No special "administrative agency" is created by the Leasing Act. Yet all of the other Public Land Laws are similarly administered by the Secretary and the "policy" of Congress has been to leave to local law and local tribunals, the adjudication of "**private transactions**" had by those holding inceptive "rights" under such laws. As noted, the Secretary has applied this "policy" to the Leasing Act.

The foregoing cases disclose **that where a federal statute** (including existing regulations thereunder and the decisions interpreting it) **intersects the local law, there should be a serious effort to accommodate the state law where there is a conflict between private parties, provided that, in doing so, there is reasonable opportunity afforded the protection of the Federal interest.**

³³ Even in the field of labor law, in *Hamilton Foundry & M. Co., v. International M. & F. Wkrs.*, 193 F. 2d 209 (C. C. A. 6th, 1951), certiorari denied 343 U. S. 966, a local Statute of Frauds was applied to a collective bargaining agreement, the Court saying, page 215: "Although the contract and federal jurisdiction to enforce it arise out of a federal statute, *the enforcement of the right must conform to the remedy prescribed by the law of the state where the action is brought.* We agree with appellant that a state statute can not change or diminish a substantive right created by a federal statute, . . . , but a state statute is applicable *where it deals with the remedy rather than with the substantive right . . .*" This decision was cited with approval in *Lincoln Mills*, but the decision in *Lincoln Mills* leaves it unclear as to whether or not this remedy would be "a merely peripheral concern of the Labor Management Relations Act," as referred to in the *San Diego Unions* case.

The majority opinion, in stating that all issues between the private parties now before the Court, should be decided under federal law, made no apparent effort to accommodate the local law and did not explain how the application of the local law might, even to the slightest extent, represent a conflict between federal and local law. But admitting, *arguendo*, that there is some possible conflict, we submit that Congress, by § 32 of the Act, has resolved that conflict in favor of local law.³⁴

III. The Original Opinion Of The Majority Below And The *Boesche* Case, In Light Of Decisions Concerning The Public Land Laws, Generally, And The Decisions Interpreting The Mineral Leasing Act.

Without mention of the *Boesche* case, the original opinion (R. 78) of the majority relied entirely upon decisions relating to the Public Land Laws, generally, with only a passing reference to the Leasing Act and its "policy" against "monopoly." **Not one single case was cited** which dealt with the Leasing Act. In its second opinion (R. 107) the majority did not explicitly repudiate the predicate for its original opinion, although, we submit, it did so by inference, for it acknowledged that: "We have concluded that our decision should be more closely tied to that [Leasing] Act." It is apparent that the second decision utilized the *Boesche* case as a vehicle for avoiding the force and effect of decisions relating to the

³⁴ Added evidence of Congressional solicitude and regard for the full sway of local law is found in Section 30 of the Act, where Congress detailed certain matters which should be covered by provisions to be inserted in Federal leases, and then concluded with the provision: "That none of such provisions shall be in conflict with the laws of the State in which the leased property is situated." App., *infra*, pp. 103-104.

Public Land Laws, generally, and which demonstrated the inapplicability of those decisions originally relied upon. It is, therefore, necessary to consider the original opinion, and particularly the decisions relating **generally** to the Public Land Laws. This consideration serves as a predicate for an examination of the second opinion and the decisions interpreting the Leasing Act. Also it will place the *Boesche* case in proper focus.

A. The Decisions Relating To The Public Land Laws As Respects The Nature Of Inceptive Rights While The Legal Title Remains In The United States.

The decisions and jurisprudence relative to the disposition of lands pursuant to the Public Land Laws, have developed within the framework of the following propositions: (1) "... The power of Congress to dispose of any kind of property belonging to the United States 'is vested in Congress without limitation' . . . The power over the public land thus entrusted to Congress is without limitations. 'And it is not **for the courts** to say how that trust **shall be administered**. That is for Congress to determine.' " *Alabama v. Texas*, 347 U. S. 272, 273 (1953);³⁵ (2) Congress has delegated authority over the administration and disposition of the public domain, to the Secretary of the Interior and the Land Department. *Best v. Humboldt Mining Co.*, 371 U. S. 334 (1962);³⁶ and (3) As respects such public domain, "... the power of Congress is exclusive

³⁵ Cf. *Standard Oil Co. of California v. U. S.*, 107 F. 2d 402, 409 (C. C. A., 9th, 1939), *certiorari denied* 309 U. S. 654, 309 U. S. 673: "... The disposal of the public lands is not a subject over which the 'judicial power' of the United States is extended . . ."

³⁶ Cf. page 339: "... Congress has entrusted the Department of the Interior with the management of the public domain and prescribed the process by which claims against the public domain may be perfected . . ."

and that only through its exercise in some form can rights in lands belonging to the United States be acquired. True, for many purposes a State has civil and criminal jurisdiction over lands within its limits belonging to the United States, but this jurisdiction does not extend to any matter **that is not consistent with full power in the United States** to protect its lands, to control their use and to prescribe in what manner others may acquire rights in them . . ." *Utah Power & Light Co. v. U. S.*, 243 U. S. 389, 404 (1916).

As respects the first two propositions above noted, we digress in order to pose these propositions, to-wit: Where is there any "duty" imposed upon the "federal courts" to see that "the equitable title as well as the legal title to public lands"³⁷ is properly vested? And, assuming the Leasing Act contemplates that someone will "fill the interstices," where has Congress delegated authority so that "federal courts must fill the interstices"?³⁸ As respects both questions posed, are not these matters delegated by Congress **solely and exclusively** to the Secretary of the Interior?³⁹ As respects the third proposition, con-

³⁷ First opinion of the majority, R. 80.

³⁸ Second opinion of the majority, R. 110.

³⁹ Title to the land still being vested in the United States, are not such matters within the sole jurisdiction of the Secretary under Section 32 of the Act (App., *infra*, p. 106) for he "is authorized to prescribe . . . regulations . . . and to do any and all things necessary to carry out and accomplish the purposes of" the Act? One premise for the decision in the *Boesche* case, was the fact that title to the land, in the case of a lease, remained in the United States, yet this Court limited the effect of the decision with this circumscribing caveat: "We sanction no broader rule than is called for by the exigencies of the general situation and the circumstances of this particular case. We hold only that the Secretary has the power to correct administrative errors of the sort involved here by cancellation of leases in proceedings timely instituted by competing applicants for the same land." 373 U. S. 472, 485.

sidering the Secretary has granted Wallis the lease, wherein is local law "not consistent with the full power of the United States," when such local law merely says that by these private transactions in light of the local Statute of Frauds, McKenna and Pan Am **have not** acquired an interest in Wallis' lease? More particularly, how does such application of local law affect or frustrate the "policy" against "monopolies"?

In considering the cases relating to the Public Land Laws, it should be remembered that the "policy" against "monopoly" is not unique or peculiar only to the Leasing Act. For we do not know of a single Public Land Law (disposing of rights generally to the public) wherein this same "policy" does not inhere, for all such Acts that we have found have acreage limitations as respects permissible holdings.⁴⁰ Yet the decisions relating to such Public Land Laws, generally, hold that local law is applicable to private transactions and dealings affecting inceptive rights in "public lands," where the "legal title" is still vested in the United States. And this without any suggestion or intimation that it conflicts with the statutory "policy" against "monopolies." Furthermore, where statutory "policy" was being frustrated by private contracts relating to such inceptive rights, this Court has noted that it was Congress that corrected the situation, rather than say-

⁴⁰ Cf. *U. S. v. Trinidad Coal & Coking Co.*, 137 U. S. 160, 166 (1890), Rev. Stat. sec. 2347, 30 U. S. C. 71, as to coal. In the homestead laws (Rev. Stat. sec. 2289; 26 Stat. 1097; 43 U. S. C. sec. 161), the timber and stone laws (20 Stat. 89; 27 Stat. 348; 43 U. S. C. sec. 311), the desert-land laws (19 Stat. 377; 26 Stat. 1096; 43 U. S. C. sec. 321), the laws pertaining to underground water reclamation grants (41 Stat. 293; 43 U. S. C. sec. 351), the Taylor Grazing Act, as it relates to homesteads 48 Stat. 1272; 43 U. S. C. sec. 315f), and the mining laws (Rev. Stat. secs. 2320, 2329, 2331; 30 U. S. C. secs. 23, 35).

ing that the "policy" of the statute conferred interstitial authority upon the Courts to do so.⁴¹

In considering the incipient "rights" of a homesteader, *U. S. v. Buchanan*, 232 U. S. 72 (1913), held that the entryman acquired the right to "treat the land as his own" though "legal title" remained in the United States, and this "right was in the nature of private property," saying, at page 77: "... The entry by Moore withdrew the land from entry or settlement by any other, and segregated the quarter-section from the public domain. **The legal title remained in the Government** until patent issued, but **as against all except the United States** he was the lawful possessor **clothed with an inceptive title . . . * * *** This view is sustained by the terms of the statute and is in accord with the policy to leave the protection of such possessory claims to the laws of the several States. Congress could have legislated so as to make the statute applicable until patent issued. But instead of doing so, it left the homesteader, who had acquired a possessory title, to avail himself of the same rights that were open to others holding lands, by title absolute or inchoate . . ."

In *Gauthier v. Morrison*, 232 U. S. 452 (1913), suit was instituted by a homesteader in a State court, seeking protection of his inceptive "right" to the land, and the State court dismissed for want of jurisdiction, since it appeared that the claim depended upon a matter assumed to be within the jurisdiction of the Land Department. In

⁴¹ In *Myers v. Croft*, 80 U. S. 291 (1871), at page 295: "This was felt to be a serious evil, and Congress, in the law under consideration, undertook to remedy it by requiring of the applicant for a pre-emption, before he was allowed to enter the land on which he had settled, to swear that he had not contracted it away, nor settled upon it to sell it on speculation . . ."

reversing, this Court held that, "... no interference with that [Land] department or usurpation of its functions was here sought or involved. * * * Congress has not prescribed the . . . mode in which such wrongs may be restrained and redressed . . . **but has pursued the policy** of permitting them to be dealt with **in local tribunals** according to **local modes of procedure.**"⁴² In support thereof, the cases of *Lytle v. Arkansas*, 63 U. S. (22 How.) 193 (1859), and *Black v. Jackson*, 177 U. S. 349 (1899), are cited, among others. In the *Lytle* case, this statement appears, page 205: "This slab tenement was built by Moses Austin, about 1820. On leaving Little Rock, **he sold** it to Doctor Mathew Cunningham; it passed through several hands, till it was finally **owned by** Col. Ashley. Buildings and cultivated portions of the public lands were **protected by the local laws** of the Arkansas Territory; either ejectment or trespass could have been maintained by Ashley against Cloyes to recover the premises, nor could an objection be raised by any one, **except the United States, to these transfers** of possession—neither could Cloyes be heard to disavow **his landlord's title**. He held possession for Ashley, and was

⁴² The Court said, page 461: "Generally speaking, it also is true that it is not a province of the courts to interfere with the Land Department in the administration of the public-land laws, and that they are to be deemed in process of administration until the proceedings for the acquisition of the title terminate in the issuing of a patent. *But no interference with that department or usurpation of its functions was here sought or involved.* It has not been invested with authority to redress or restrain trespasses upon possessory rights or to restore the possession to lawful claimants when wrongfully dispossessed. *Congress has not prescribed the forum and mode in which such wrongs may be restrained and redressed,* as doubtless it could, *but has pursued the policy of permitting them to be dealt with in the local tribunals according to local modes of procedure.* And the exercise of this jurisdiction has been not only sanctioned by the appellate courts in many of the public-land States, but also recognized and approved by this court . . ."

subject to be turned out on a month's notice to quit." In the *Black* case, the local court had issued a mandatory injunction requiring an adverse possessor to remove certain improvements from a homestead claim, and, in reversing, this Court said, page 359: "**What circumstances under the laws of Oklahoma will justify the use of a mandatory injunction for the purpose of ousting a person of the possession of land and putting his adversary in possession—neither party having the legal title—is left in some doubt by the decisions of the Supreme Court of that Territory . . .**" The Court then proceeded to note the extensive local laws dealing with possessory rights, and decided the case based on local decisions.

It is obvious from the foregoing decisions, that in the determination by State courts of private "rights" to possession of property, the legal title to which was in the United States, it was necessary for local law to be applied in resolving disputes which flowed from private transactions, such as deeds, leases, agreements to sell, and other similar types of contracts. This is made manifest from the case of *Marquez v. Frisbie*, 101 U. S. 473 (1879), when this Court said, page 475: "We did not deny the rights of the courts to deal with the possession of the land **prior to the issue of the patent, or to enforce contracts between the parties concerning the land . . .**" These cases illustrate the fact that as respects such incipient "rights," and even prior to the issuance of "legal title," the Courts apply local law to the private contracts concerning such rights.

Similarly, as respects the incipient "right" of a mining claim,⁴³ and in sustaining a local tax and resulting lien thereon, *Forbes v. Gracey*, 94 U. S. 762 (1876), states page 767: ". . . Those claims are the subject of bargain and sale, . . . They are property in the fullest sense of the word, and their ownership, transfer, and use are governed by a well-defined code or codes of law, and are recognized by the States and the Federal government. **This claim may be sold, transferred, mortgaged, and inherited, without infringing the title of the United States.** Why may it not also be made subject to a lien for taxes, and the claim, such as it is, recognized by statute, **be sold to enforce the lien? We see nothing in principle or in any interest which the United States has in the land to prevent it.**" While recognizing that such incipient mining claim was "property" and thus subject to local tax law and lien, as well as vesting "the right to sell, transfer, mortgage and inherit," yet *Black v. Elkhorn Mining Co.*, 163 U. S. 445 (1896), held that local law could not impose a right of dower thereon, saying: ". . . We do not think that under the Federal statute the locator **takes such an estate in the claim that dower attaches to it.**" * * * By the terms of the statute there is no grant of any right to the wife. It is granted to the locator and to his heirs and assigns, and **there is no condition that**

⁴³ In *Cameron v. U. S.*, 252 U. S. 450 (1919), at page 460: "A mining location which has not gone to patent is of no higher quality . . . than are unpatented claims under the homestead and kindred laws. *If valid, it gives to the claimant certain exclusive possessory rights, and so do homestead and desert claims . . .*"

hampers the right to convey by encumbering it with an inchoate right of dower . . .”⁴⁴

And *Ducie v. Ford*, 138 U. S. 587 (1890), affirmed the application of the local Statute of Frauds to the assertion of an “equitable trust” on property held under a mining patent, which asserted “trust” was predicated upon an oral agreement made with the patentee prior to issuance of the patent by the United States.⁴⁵ *Ducie* cannot be distinguished from the cases at bar.

The foregoing cases dealing with the “rights” acquired by private individuals in “public lands,” disclose that such “rights” are “property,” assuming, but by no means admitting that the “legal title” to such lands is still vested in the United States. They further demonstrate that local law governs private contracts and transactions relating to such inceptive “rights” and thus may operate indirectly or incidentally on such “rights” by governing such transactions, all so long as local law: (1) is consistent with the “legal title” being vested in the United States, (2) is not contrary to, or in conflict with, an Act of Congress, and (3) does not purport to operate directly upon the legal title

⁴⁴ Similarly, *McCune v. Essig*, 199 U. S. 382 (1905), held that the incipient “right” of a homesteader, who died prior to the issuance of a patent, would not vest in his widow in accordance with local community property law, but such right would devolve in accordance with the Act of Congress. However, *Buscher v. Buscher*, 231 U. S. 157 (1913), held that upon issuance of a patent to a homesteader, the title so vested in the patentee as community property under local law.

⁴⁵ In *Williams v. U. S.*, 138 U. S. 514 (1890), decided on the same day as the *Ducie* case, this Court said, at page 522: “This brings us to the final contention . . . and that the government pays no attention to private disputes between parties who have transactions in respect to public lands before it parts with its title, . . . * * * In the main, we do not doubt these propositions of law; . . .” We will consider this case in more detail hereafter.

to the land or attempt **directly** to regulate or vest legal title to the land. **But most important**, they clearly show that such operation of local law, does not **frustrate, interfere with or affect**, the "policy" of the various statutes as opposed to "monopolies."

B. Decisions Relating To The Public Land Laws As Respects The Equitable Power Of The Courts And The Application Of Federal Law.

The decisions by this Court disclose that the equitable powers of Federal Courts, whereby they apply Federal law, **only extend to reviewing** matters which transpired or were initiated before, the Land Department. And in exercising this power, it may only recognize "equitable rights" which had **originated with, or had been presented to, and been denied by, the Land Department.**

The leading case on this subject, is *Johnson v. Towsley*, 80 U. S. 72 (1871), where the Court said, at page 85: ". . . if for any other reason recognized by courts of equity, as a ground of interference in such cases, the legal title has passed from the United States to one party, when, in equity and good conscience, **and by the laws which Congress had made on the subject**, it ought to go to another, 'a court of equity will,' . . . , 'convert him into a trustee of the true owner, and compel him to convey the legal title.' . . ."⁴⁶ We cannot emphasize too strongly, the statement from this extract, that the equitable power will operate

⁴⁶ The Court said, page 85: ". . . So also the register and receiver, . . . , often hear the application of a party to enter land as a pre-emptor or otherwise, decide in favor of his right, receive his money, and give him a certificate that he is entitled to a patent. Undoubtedly this constitutes a vested right, and it can only be divested according to law. In every such case, where the land office afterwards sets aside this certificate, and grants the land thus sold to another person, it is of the very essence
(continued)

"when, in equity and good conscience, **AND by the laws which Congress has made on the subject**, it ought to go to another . . ." ⁴⁷ Thus **it is not alone sufficient**, that a party may be **seeking** an equitable remedy, but he **must also show** that "by the laws which Congress has made" the property "ought" to go to him. Here McKenna and Pan Am cannot show that by any law of Congress, the lease ought to have been awarded to them by the B. L. M. rather than to Wallis. McKenna and Pan Am took absolutely no steps to obtain the lease from the B. L. M. in accordance with the Act of Congress, but they claim only through private contracts made with Wallis, ⁴⁸ **who was the only one who**

(⁴⁶ cont'd) of judicial authority to inquire whether this has been done in violation of law, and, if it has, to give appropriate remedy. And so, if for any other reason recognized by courts of equity, as a ground of interference in such cases, the legal title has passed from the United States to one party, when, in equity and good conscience, *and by the laws which Congress has made on the subject*, it ought to go to another, 'a court of equity will,' . . . , 'convert him into a trustee of the true owner, and compel him to convey the legal title.' . . . "

⁴⁷ This rule was summarized in *Rector v. Gibbon*, 111 U. S. 276, at page 290, as follows: ". . . , the jurisdiction of courts of equity might be invoked to ascertain if the patentees did not hold in trust for other parties; and if it appeared that the party claiming the equity *had established his right to the land upon a true construction of the acts of Congress*, and by an *erroneous construction* the patent had been issued to another, the court would correct the mistake . . . "

⁴⁸ In *Oldland v. Gray*, 179 F. 2d 408 (C. C. A., 10th), *certiorari denied* 339 U. S. 948, where the plaintiff sought to impose an "equitable trust" on a Federal oil and gas lease, the Court said, at page 412: ". . . *Federal law did not create this asserted cause of action, nor is it an essential element thereof in the sense that the cause of action will be sustained if federal law is given one construction or effect, and defeated if given another. The asserted rights of the parties arise out of a private contract, and they must stand or fall upon its construction or effect . . .*" In *Manuel v. Wulff*, 152 U. S. 505, 511 (1894), in speaking of the inapplicability of the Federal mining statute, to a conveyance of a mining location, this Court said: ". . . his claim passed to his grantee, not by operation of law, but by virtue of his conveyance . . . "

sought and obtained the lease "by the laws which Congress had made on the subject."

The foregoing principle of *Johnson v. Towsley*, was elaborated upon more fully in the case of *Marquez v. Frisbie*, from which we quote (*supra*, p. 45). In the *Marquez* case, the Court pointed out the circumstances under which an **action at law** will lie, and also when a **court of equity has jurisdiction**, holding the patent was **conclusive in courts of law**, as respects matters which transpired before the Land Department **prior** to issuance of the patent. But as respects a **court of equity**, the Court said, page 476: ". . . But that in this class of cases, as in all others, there exists in the courts of equity the jurisdiction to correct mistakes, to relieve against frauds and impositions, and in cases where it is clear that these officers [of the Land Department] have by a mistake of the law, given to one man the land which, on the undisputed facts, belonged to another, to give appropriate relief.' *Moore v. Robbins*, 96 U. S. 530, 535; *Shepley v. Cowan*, *supra*; *Johnson v. Towsley*, *supra*."⁴⁹

In accordance with the foregoing is *St. Louis Smelting and Refining Company v. Kemp*, 104 U. S. 636, holding that equity could not afford relief, if the plaintiff could

⁴⁹ The derivative of the Court's power and authority to judicially review matters which transpire before the Secretary, as respects his disposition of the "legal title," is as stated in *Standard Oil Co. of California v. U. S.*, *supra*, at page 410: ". . . If Congress has clothed the Secretary with general authority to administer the grant, and if his decision of fact in this instance was made within the scope of such authority, there can be no doubt that his decision is conclusive on the courts, in the absence, at any rate, of fraud or imposition . . . Of course, in order to give conclusive effect to his decision, the Secretary's power in the premises must be exercised within the limits of due process, . . ."

not "connect himself with the original source of title . . . (and) aver that his rights are injuriously affected by the existence of the patent."⁵⁰ On the other hand, the case of *Marquez v. Frisbie*, *supra*, while acknowledging that Courts could "deal with the possession of land" prior to patent, and "enforce contracts between the parties concerning the land," yet it had this to say, page 475: "And we think it would be quite as objectionable to permit a State Court, while such a question was under the consideration and within the control of the executive department, to take jurisdiction of the case by reason of their control of the parties concerned, and render decree in advance of the action of the government, **which would render its patents a nullity when issued.**" Since a State Court could not do this, necessarily a State Legislature could not by law, attempt to operate **directly** upon the title to the land, prior to patent, and "render (the) patents a nullity when issued." This was the purport of the Statute involved in the case of *Irvine v. Marshall*, 61 U. S. (20 How.) 558, and it is

⁵⁰ Cf. page 647: ". . . The judgment of the department upon their sufficiency was not, as already stated, open to contestation. If in issuing a patent its officers took mistaken views of the law, or drew erroneous conclusions from the evidence, or acted from imperfect views of their duty, or even from corrupt motives, a court of law can afford no remedy to a party alleging that he is thereby aggrieved. He must resort to a court of equity for relief, and even there his complaint cannot be heard unless he connect himself with the original source of title, so as to be able to aver that his rights are injuriously affected by the existence of the patent; and he must possess such equities as will control the legal title in the patentee's hands. *Boggs v. Merced Mining Co.*, 14 Cal. 279, 363. It does not lie in the mouth of a stranger to the title to complain of the act of the government with respect to it. If the government is dissatisfied, it can, on its own account, authorize proceedings to vacate the patent or limit its operation." See also: *Steel v. St. Louis Smelting and Refining Company*, 106 U. S. 447, 454, and *Borhall v. Dilla*, 114 U. S. 47 (1884).

only to this extent that *Irvine* is competent authority, and the foregoing decisions disclose the error of the first opinion in applying it to the facts here involved, and, in accepting it as controlling.⁵¹

It was the rule announced in the foregoing cases (and some discussed hereafter) which required the majority of the Court below to retreat from (if not abandon) the predicate for the original opinion. This it did in an obscure fashion in the second opinion, when (R. 108) it said: "It should be noted that the actions before the district court, and before this Court on appeal, **do not seek to overturn the decision of the Secretary awarding the lease to Wallis. McKenna and Pan American were not applicants who competed with Wallis** before the Secretary. Indeed, it is evident that McKenna and Pan American **supported Wallis's claim to the Secretary** that he was the first qualified applicant for the acreage in question and entitled to a lease. If these actions were those of 'competing claimants,' the Secretary's decision **would be subject to judicial review only** if it were shown that he had acted arbitrarily or unreasonably or that his interpretation of what consti-

⁵¹ Additional reasons why the *Irvine* case is not controlling here, are: (1) the Statute involved was not a Statute of Frauds, for the case was before the Supreme Court on a demurrer, and the decision upon remand (Cf. *Irvine v. Marshall and Barton*, 7 Minn. 286, 1862) discloses there was a written contract involved; (2) the "legal title" to the land was still vested in the United States, whereas here the "title" to the lease has been given by the Land Department to Wallis; (3) *both parties* in the *Irvine* case were asserting inceptive "rights" to the land involved; and (4) the "legal title" to the land being in the United States and thus the matter being within the jurisdiction of the Land Department, the foregoing cases disclose that the Federal court had no more authority to decide "title" or, purport to vest "title," by imposing an "equitable trust," than did the State court. Cf. *Marquez v. Frisbie*, *supra*.

tutes 'public lands' was erroneous as a matter of law. E. g., *Morgan v. Udall*, D. C. Cir. 1962, 306 F. (2d) 799."⁵²

The foregoing discloses the extent to which a Federal court may apply Federal law, under the Public Land Laws generally, as respects "equities" asserted by a third person, where such "equities" originate **prior** to the severance of the "legal title" from the United States. These cases disclose that it is only where such "equities" originate in proceedings before the Land Department—where the parties are "competing claimants," that the Federal Courts might adjudicate under Federal law. On the other hand, if such "equities" do not so originate, but only originate prior to issuance of "legal title" and from a private contract or dealings had with the **only one** having inceptive "rights," then the "equities" are governed by "local law," in that local law governs his rights and remedies as respects such private transactions.⁵³

⁵² In light of the foregoing decisions by this Court, which were cited to the Court below, it is ironical that the majority opinion chose to cite *Morgan v. Udall* in support of this statement. Wallis was a party to that suit, along with the Secretary of the Interior, and the suit by Morgan sought judicial review of the Secretary's award to Wallis of the very Federal lease here involved. The decisions above cited disclose that Morgan's suit is the *only instance* where a Federal court of equity might have jurisdiction to apply Federal law, and, impose an "equitable trust" on the "title" to a Federal lease after issuance by the Secretary. For Morgan's claim *originated* with the Land Department and he had initially sought the lease (adversely to Wallis) *from and before* the Land Department. Morgan was not (as are McKenna and Pan Am) claiming the lease *by and through* Wallis.

⁵³ We submit the same law is applicable to the cases at bar, for the asserted rights of both McKenna and Pan Am originate from private contracts with Wallis, entered into prior to the issuance of the lease to Wallis. They did not claim "adverse" to him before the B. L. M., but now claim through and under Wallis, and, as the Trial Court held, such contracts *did not even deal* with the application for the lease which ultimately issued.

That jurisdiction of a Federal court to apply Federal law **does not extend** to private transactions and contracts had with one **who is the only party** dealing with the Land Department, is clearly demonstrated in the case of *Williams v. U. S.*, *supra*. There Williams made a "desert-land" entry, and then purported to "sell" eighty acres thereof by warranty deed for \$5,000.00, and the "purchaser" spent approximately \$60,000.00 in erecting a quartz mill thereon. It was apparent that Williams then devised a scheme to defraud the "mill owners," and he did not do the required reclamation work, but relinquished and cancelled his "desert-land" entry. At the same time he set about obtaining title thereto through the State, since the State was entitled to select the lands under an appropriate Act of Congress. The "legal title" was granted the State, and Williams then acquired from the State. The Court set aside the transfer by the Secretary to the State because of "inadvertence and mistake," occurring in the Land Department, which had resulted in the Secretary's approving the State's selection list. This "mistake" **did not** relate to Williams' private transaction with the "mill owners," but the Court recognized the overwhelming "equities" in favor of the "mill owners," resulting from their private contract with Williams, and his conduct⁵⁴ in attempting to defraud them. In answer to Williams' argument, that the "legal title" had properly vested in the State in accordance with the Act of Congress and that the "government pays no attention to private parties who have transactions in re-

⁵⁴ We remind the Court, that there is no finding of facts, in the case at bar, that Wallis attempted by scheme or artifice to defraud the plaintiffs under the contracts here involved, but assuming, *arguendo*, that such were the case, local law provides an adequate remedy, as noted by both Judge Wright and Judge Wisdom, each of whom was trained in the Civil Law which prevails locally.

spect to public lands before it parts with its title," the Court said: "In the main, we do not doubt these propositions of law." However, the Court noted that had the "equities" in favor of the "mill owners" been called to the attention of the Secretary, since the law required his approval of the selection list, he would have been justified in declining to certify the list, saying at page 524:

"... It (the statute) gives the power to the Secretary to deny this application of the State, and refuse to approve its selection, and hold the title in the general government until, within the limits of existing law or by special Act of Congress, a party who, misinformed and misunderstanding its rights, has placed such large improvements on the property, shall be enabled to obtain title from the government."

In connection with this holding, these propositions should be noted: (1) The Court held that the Secretary had the "power" (not the "duty") to consider the "equities" arising from this private transaction; (2) it did not suggest that the equity power of the Court was such, **that under Federal law**, the private contract with Williams would permit the imposition of an "equitable trust" upon the "legal title" held by Williams,⁵⁵ and (3) on the contrary, it held that the Land Department might hold the "legal title" in the "government until, within the limits of existing law or by special Act of Congress," the "mill owners" would be able "to obtain title from the government." But more important still, is the holding that under the Act of Congress the Secretary had been granted the "power" to

⁵⁵ As heretofore noted, this decision was handed down *on the same date*, as *Ducie v. Ford*, Cf. *supra*, p. 47, for comment and comparison.

take cognizance of the "equities" arising from this private contract and transaction. For such grant of "power" by Congress to the Secretary, completely negatives and precludes any authority or jurisdiction in the Federal courts over such "equities," whether as a court of equity, or, interstitially under Federal law.

These cases, we submit, conclusively demonstrate that Federal courts have no jurisdiction to apply Federal law to such private transactions. The Secretary has the "power" to consider such "equities", but where he has not done so, or does not choose to, the parties are relegated to local law. As heretofore noted⁵⁶ as respects inceptive rights, the "policy (is) to leave the protection of such possessory claims to the laws of the several States, . . . , it (the statute) left the homesteader . . . , to avail himself of the same rights that were open to others holding lands, by title absolute or inchoate . . ." As we have shown herein, the Secretary has done just that.

C. Decisions Relating To And Interpreting The Mineral Leasing Act, Are Contrary To The Decision Below.

In administering the Leasing Act, the Land Department has consistently applied thereto, the cases and decisions relating to the Public Land Laws, generally, as respects one who holds "inceptive rights" thereunder.⁵⁷ And,

⁵⁶ Cf. *U. S. v. Buchanan*, *supra*, p. 43.

⁵⁷ The Land Department decision in *Lula T. Pressey*, 60 I. D. 101 (1947), states at page 102: "It was well settled long prior to the passage of the Mineral Leasing Act that an entry of public land under the laws of the United States segregates it from the public domain, appropriates it to private use, and withdraws it from subsequent entry or acquisition until the prior entry is officially canceled and removed (citing cases)

* * * Shortly after the passage of the Mineral Leasing Act,
(continued)

as heretofore noted, the Land Department, in interpreting the Act, has consistently held that a Federal lease conveys an interest in the land. The decisions of the Courts in interpreting and applying the Leasing Act, are entirely consistent with this position of the Land Department.

One of the first decisions construing the Act, was the case of *Hodgson v. Federal Oil & Development Co.*, 274 U. S. 15 (1927). In the Court below, Wallis asserted that this decision was controlling in his favor. However, the second opinion of the majority held (R. footnote 7, p. 114) that: "We read *Hodgson* as fashioning a federal law of fiduciary relationship by drawing on the law of several states." We submit this holding is in error, and that the case does, in fact, support the position of Wallis. Before considering the position of the majority, and the *Hodgson* case, these matters should be borne in mind, to wit: (1) *Hodgson* was a suit in equity, (2) it was decided in the "pre-Erie-pre-Guaranty Trust Co. v. York era," and (3) **the rule** of *Johnson v. Towsley*, that courts of equity would impose a "trust" on the "legal title," when "in equity and good conscience **AND** by the laws which Congress has made on the subject, it (the "legal title") ought to go to another . . ."

The *Hodgson* case arose in Wyoming and *Hodgson* was attempting to impose an "equitable trust" upon a lease issued to the oil company pursuant to § 18 (App., *infra*, pp. 90-91) of the Leasing Act. Of importance is the fact

(⁵⁷ cont'd) *the same rule was held to apply to applications filed under that act . . . This rule has been followed repeatedly by the Department, both with respect to applications for permits and for leases. (citing I. D. decisions)"*

that § 18 was a special "relief" provision of the Act designed to fit a particular situation, and, to afford relief to those whom Congress considered had suffered a hardship as a result of the "withdrawal order" of the President issued September 27, 1909.⁵⁸ Section 18 provided that if those who were in possession prior to July 3, 1910, under claims (pursuant to the pre-existing placer mining law) to any oil and gas bearing land incorporated in the "withdrawal order," were still in possession (undisputed prior to July 1, 1919), they would, upon surrender of their rights (under certain conditions and within a delay), be entitled to the issuance of a lease. Of particular importance as respects this case is the fact that § 18 **specifically provided** that "all leases hereunder shall inure to the benefit of the claimant and all persons claiming **through or under him** by lease, contract, or otherwise, as their interest may appear."⁵⁹ Hodg-

⁵⁸ In the *Boesche* case, *supra*, the Court said, page 480: "Public lands valuable for their oil deposits had been opened to entry as placer mining claims by the Act of February 11, 1897, 29 Stat. 526. In 1909, confronted with a rapid depletion of petroleum reserves under this system, the President issued a proclamation withdrawing from further entry pending the enactment of conservation legislation upwards of 3,000,000 acres of land in California and Wyoming . . ."

⁵⁹ We ask the Court to give particular consideration to this quoted provision. It *does not apply* to leases issued *generally* under the Act, but it *only applies* to leases issued under this *special and restricted section*. It should be noted that were this provision applicable generally to the Act, it would cover and include the precise situation here involved. McKenna and Pan Am are claiming the lease issued to Wallis, *not* (as the majority concedes) as "competing claimants" before the B. L. M. but (to employ the language of this special provision) "through and under (Wallis) by . . . contract, or otherwise." The majority below, of course, did not hold *this provision* applicable to the cases at bar, since it was a *special provision*. But the holding of the majority is to the effect, that Congress intended that this very provision *be supplied to the Act generally*—through the process of "federal courts must fill the interstices" !!! The majority said: "Whether the lease from
(continued)"

son was claiming that he owned an undivided interest in the placer mining claim, which the oil company had surrendered and in return for which it received the lease issued under § 18 of the Act. Hodgson asserted two predicates for his recovery, to-wit: first, he claimed that he would be entitled to a lease under § 18 by surrendering his placer claim, and, second, he claimed that his grantors were co-owners of the placer claim with the oil company, and being co-owners, a resulting fiduciary relationship was established between them and this relationship precluded a co-owner from acquiring and asserting an adverse title, thus he was entitled to impose an "equitable trust" on the legal title held by the oil company. The Court found that the co-tenancy accrued at different times and by different instruments purporting to convey the full title to the claim.

As respects the assertion that Hodgson was entitled to recover under § 18 of the Act, after pointing out that he had not complied with the Act, the Court applied the rule of *Johnson v. Towsley*.⁶⁰ We submit, that in disposing

(⁵⁹ cont'd) the United States to Wallis was in part for the benefit of McKenna or of Pan American or of both are questions to be determined by federal law." (R. 80.) This express provision of the Act is restricted in its application by Congress, but the majority now says that Congress intended the Courts should supply this provision and make it applicable to the Act generally.

⁶⁰ The Court said, page 19: "... The Oil and Development Company did not obtain *what otherwise would have been granted to them*; and the principle under which the patentee was declared trustee for another in such cases as *Silver v. Ladd*, 7 Wall. 219, and *Svor v. Morris*, 227 U. S. 524, *does not apply*. *Anicker v. Gunsburg*, 246 U. S. 110, 117, holds: 'In order to maintain a suit of this sort the complainant *must establish not only that the action of the Secretary was wrong in approving the other lease, but that the complainant was himself entitled to an approval of his lease, and that it was refused to him because of an erroneous ruling of law by the Secretary.*'"

of this phase of the case, the Court applied Federal law to **the extent permissible**, and, thereby disposed of the only contention asserted **to which Federal law was applicable**. But more important still, it should be observed that the Court applied to the Leasing Act, cases which dealt with the Public Land Laws, generally, and more particularly it treated the matter as though the "legal title" to the lease had vested.

On the second phase of the case, having to do with the question of a fiduciary relationship resulting from cotenancy, we submit that, the Court was sitting and functioning as any Federal court of equity would have, in a diversity case during the "pre-Erie-era." In disposing of the question, the Court noted that the rule relative to fiduciary relationship between co-tenants did not apply if, "the interests of the cotenants accrue at different times, under different instruments, and neither has superior means of information respecting the title." In support of this rule, which it called an "exception," it cited a decision by this Court and several decisions by the Supreme Courts of various States, and concluded by saying: "We know of no opinion by the courts of Wyoming to the contrary."⁶¹ It was this last statement, Wallis submits, which constituted an acknowledgment by the Court, that it was bound to follow local law, and, would have done so, if there had been a local decision from Wyoming (the *situs* of the property) on the question. This being the era preceding the

⁶¹ The Court said, page 20: ". . . This exception to the general rule is recognized in *Turner v. Sawyer*, 150 U. S. 578, 586; *Elder v. McClaskey*, 70 Fed. 529, 546; *Freeman on Co-Tenancy and Partition*, § 155; *Shelby v. Rhodes*, 105 Miss. 255, 267; *Sands v. Davis*, 40 Mich. 14, 18; *Joyce v. Dyer*, 189 Mass. 64, 67; *Steele v. Steele*, 220 Ill. 318, 323. We know of no opinion by the courts of Wyoming to the contrary."

"doctrine of abstention," and while in the pre-*Erie*-era, nevertheless under the doctrine of *Swift v. Tyson*, local decisions controlled and applied "to rights and titles to things having a permanent locality, such as rights to real estate." **This very doctrine was recognized and applied by the Fifth Circuit** in a decision handed down while the case at bar was pending on rehearing, which decision was authored by the same Judge **who wrote the two majority opinions below.** *The Leiter Minerals, Inc., v. U. S., supra*, p. 33, footnote ³⁰~~29~~.⁶² As respects the holding in *Leiter*, with reference to applying local law to transactions involving real estate,⁶³ the Court said: "... in the absence of a controlling decision by the highest court of the State, we should be guided by the best evidence available." We submit that this is precisely what the Court meant in the *Hodgson* case when it said: "We know of no opinion by the courts of Wyoming to the contrary." In *Clearfield Trust Co. v. U. S.*,

⁶² In *Leiter*, the Court said, page 90: "... While this is not a diversity case controlled by the Erie doctrine (*Erie R. Co. v. Tompkins*, 1938, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188), the rules of decision act always had had 'application to state laws, strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intra-territorial in their nature and character, *Swift v. Tyson*, 1842, 41 U. S. (16 Pet.) 1, 18, 10 L. Ed. 865. As to such matters, in the absence of a controlling decision by the highest court of the State, we should be guided by the best evidence available . . ."

⁶³ In *U. S. v. Certain Property, etc.*, 306 F. 2d 439 (C. C. A. 2nd, 1962), the Court said, page 444: "... Even the celebrated opinion, now rejected, upholding the power of Federal courts to disregard state decisional law in certain areas, recognized that state law should be looked to as regards 'rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intra-territorial in their nature,' *Swift v. Tyson*, 16 Pet. 1, 18, 41 U. S. 1, 18, 10 L. Ed. 865 (1842) . . ."

318 U. S. 363 (1942), and as respects *Swift v. Tyson*, this Court noted, page 367: “. . . And while the federal law merchant, developed for about a century under the regime of *Swift v. Tyson*, 16 Pet. 1, represented general commercial law **rather than a choice of a federal rule designed to protect a federal right, . . .**” In *Hodgson* the Court was concerned with a placer mining claim and the law applicable thereto, for it was that which gave rise to the lease, and **the majority below conceded that a mining claim “was property in the fullest sense of that term.”** Thus being “property” and **admittedly subject to local law**, why would this Court in *Hodgson* have had occasion to fashion “federal law” with reference to a mining claim? In the case of *Ducie v. Ford*, *supra*,⁶⁴ **the sole question presented**, was the applicability of the local Statute of Frauds, where the plaintiff was attempting to assert an oral agreement with reference to a mining claim, and thus impose an equitable trust **after** the patent issued. Applicability of the local Statute was affirmed by this Court.

We submit that it was error for the majority to characterize *Hodgson*, “as fashioning a federal law of fiduciary relationship, . . .” and *Hodgson* is controlling in favor of Wallis.

In the case of *Witbeck v. Hardeman*, 51 F. (2d) 450 (1931),⁶⁵ **decided by the Fifth Circuit**, the Court was concerned with a mere permit to prospect for oil, issued under the Leasing Act. During the course of that decision and in considering the Leasing Act, it was stated that: “. . . a lease is the final action of the Land Department in disposing of the land, and in this respect is analogous to

⁶⁴ The *Ducie* case cannot be distinguished from these cases at bar.

⁶⁵ Affirmed *Hardeman v. Witbeck*, 286 U. S. 444 (1931).

a patent."⁶⁶ While, in affirming, this Court rested its decision solely on the ground that the Secretary had properly awarded the permit, it did not take occasion to repudiate the statements made by the Fifth Circuit in its opinion.

In the case of *Alaska Consolidated Oil Fields v. Rains*, 54 F. (2d) 868 (C. C. A., 9th, 1932), the Court held that one who held an oil and gas prospecting permit issued under the Leasing Act, had "such an interest in the land" that it would be subject to a mechanic's lien for labor under the laws of Alaska."⁶⁷ As noted, this holding

⁶⁶ The opinion contains these statements: ". . . Under the Leasing Act the land of the United States is not to be conveyed by patent, but leased, so that the proprietary interest of the United States in the land never ceases. Nevertheless, *the lease is the final action of the Land Department in disposing of the land, and in this respect is analogous to a patent . . . Furthermore, since a mere permit to prospect for oil or gas under 30 USCA § 221, is exclusive, . . . , with a preference right to lease the whole land . . . , the permit may be of as much value and importance as the lease which it controls. The permit is itself an act of the Land Department, final so long as it lasts, and though in its inception a mere license conveying no estate in the land, it is a final grant of a valuable right pursuant to law which ought to be secured to the person to whom the law gives it . . . It is true that neither lease nor permit ends the interest of the United States in the land involved . . . But looking at the substance of the matter, we think that the disposition of the land has already been made by the action of the Secretary in issuing a permit on the terms fixed by the law and the regulations . . .*"

⁶⁷ The Court said, page 874: "*In view of the decisions with reference to the inchoate rights of a locator under the placer mining laws before discovery, and the analogous but more definitely determined rights of a locator who has acquired a prospecting permit, . . . We hold that he is an owner of an interest in the land within the meaning of the laws of Alaska under consideration, and that his interest therein is subject to a mechanic's lien, without prejudice to the rights of the government.*"

was **based solely** on cases relating to inceptive rights under the placer mining act.

Blackner v. McDermott, 176 F. (2d) 498 (C. C. A., 10th, 1949), **was admitted by the majority below to be contrary to its decision.** There the plaintiff, as is McKenna, was asserting a "joint venture" for the acquisition of a lease, and by virtue of the alleged "joint venture" attempting to impose an "equitable trust" upon the lease issued under the Leasing Act, and the Court stated, page 500: "... Jurisdiction of the Court resting upon diversity of citizenship, **and the action not being one under federal law**, the relationship of the parties each toward the other in respect of the leasehold estate **must be determined by the law of Wyoming . . .**" We have heretofore noted the case of *Oldland v. Gray*, *supra*, where the plaintiff held a prospecting permit issued under the Leasing Act, which he assigned, but under which he reserved an overriding royalty on the lease to be issued. In a suit to impress a trust upon the production obtained under the lease, the Court said, page 412: "... **Federal law did not create this asserted cause of action, nor is it an essential element thereof . . .** The asserted rights of the parties **arise out of a private contract**, and they must stand or fall upon its construction or effect . . ."

While the case of *Pan American Petroleum Corporation v. Pierson*, 284 F. (2d) 649 (C. C. A., 10th, 1960), certiorari denied 366 U. S. 936, was a suit to enjoin officials of the Land Department, and thus directly involved the United States, yet the Court treated a lease issued un-

der the Leasing Act as being entirely analogous to a patent to land.⁶⁸

Finally, there is the recent decision, rendered while these cases were pending on rehearing below, of *Bolack v. Underwood*, 340 F. (2d) 816 (C. C. A., 10th, 1965). In *Bolack*, as in the cases at bar, the suit involved a dispute between private individuals over the ownership of an oil and gas lease covering Federal lands. Both parties held assignments of the Federal lease executed by the lessee, however, the first assignee (*Bolack*) had not recorded his assignment as required by the laws of New Mexico, although it had been filed in the records of the Federal Land Office. In holding in favor of the junior, or second, assignee of the lease (*Underwood*), the Court applied local law, saying at page 819:

"The answer to the question of whether *Underwood* may be considered an innocent purchaser for value is dependent upon whether the records at the Federal Land Office constitute constructive notice to a purchaser of a federal lease. New Mexico law is to the effect that the federal land office records do **not** constitute such notice, as sections 65-2-1

⁶⁸ The Court said, page 654: "... This rule is said not to be applicable in the instant case because upon the issuance of a patent title passes from the United States to the patentee whereas under the Mineral Leasing Act the United States retains legal title. * * * We deem it unnecessary to delve into the legal complexities as to whether an oil and gas lease grants a profit a prendre or creates an estate in land . . . Under each theory the government, by the issuance of the lease, has performed the last act required of it to vest in the lessee the right to explore for, produce, market and sell the oil and gas UNDERLYING THE LEASED PREMISES. SIMILARLY THE ISSUANCE OF A PATENT IS THE LAST ACT OF THE GOVERNMENT IN DISPOSING OF THE NON-MINERAL LANDS OF THE PUBLIC DOMAIN . . ."

et seq., N.M.S.A., require that assignments of interests and royalties in federal oil and gas leases be recorded in the appropriate county clerk's office, and sections 71-2-1 et seq. provide that an instrument that is not recorded cannot affect the title or right to real estate of any purchaser in good faith. New Mexico law also provides that an interest in an oil and gas lease constitutes an interest in real property, e. g., *Rock Island Oil & Refining Co. v. Simmons*, 73 N. M. 142, 386 P. 2d 239. **There is no federal statute governing disputes between private individuals regarding rights to federal oil and gas leases, and in such instances, where no right of the federal government is involved, state law governs.** See *Bank of America Nat. Trust & Sav. Ass'n v. Parnell*, 352 U. S. 29, 77 S. Ct. 119, 1 L. Ed. 2d 93; *United States v. Union Livestock Sales Co.*, 4 Cir. 298 F. 2d 755, 96 A.L.R. 2d 199.

"Viewed in this posture, the problem at hand is reduced to the simple issue of whether under New Mexico law Underwood is chargeable with notice of the prior assignment to the Bolacks . . ."

Here, then, is a decision which squarely contradicts the decision below, for it holds that "There is no federal statute governing disputes between private individuals regarding rights to federal oil and gas leases,"—yet the majority below holds that the Leasing Act itself requires the Courts to fashion a law applicable to such disputes. But more important, the decision holds that in such a private dispute, "no right of the federal government is involved,"—and while the majority below could never point out wherein any right, or, interest of the federal government

was involved in these private disputes, yet it held that "uniformity" in the law applicable to such disputes is required. The decision in *Bolack* is entirely in keeping with the administrative application of the Act, by the Secretary.

The foregoing review of the jurisprudence relative to the Leasing Act, discloses that those who hold "inceptive rights" (permits) under the Leasing Act, as well as leases themselves, have and own a "property right" as respects third persons, and, that the Land Development had granted the "legal title" thereto. Aside from the specific holding that State law governs private contracts with reference thereto, these cases treat the holders of such "rights" as being entirely analogous to those who hold such "inceptive rights" under the Public Land Laws, where the "legal title" is vested in the United States. This Court in the *Hodgson* case, applied the rule of *Johnson v. Towsley* with reference to a lease issued under the Leasing Act, and that rule proceeds on the assumption that "legal title" had issued from the United States, and, we submit that, if that be true, then it is "property" vested in Wallis, and, being "property," the "legal title" to which has been conveyed by the United States, it is necessarily "property" subject to local law, at least as respects private transactions relating thereto. Cf. *Wilcox v. McConnel*, *supra*.

On the other hand, if because it is **only a lease**, where the United States has not parted with the title to the land and because the Secretary continues to administer the land and the lessor's rights under the lease—if these factors are such that the decisions above noted with reference to the Public Lands Laws **are not applicable** as respects Wallis' private transactions with third persons, then we are forced to ask where does the Federal court get

or acquire jurisdiction to decide these cases under any law? For this very acknowledgment requires the holding that the matters are still within the jurisdiction of the Land Department, and it is the Secretary (not the Courts) who has jurisdiction under the Congressional grant of authority to administer Public Lands and the Leasing Act. In *Williams v. U. S.*, *supra*, the Court said that the Secretary had the "power" to consider "equities" flowing from a private contract made with one who had an inceptive "right" to land, while the "legal title" was in the United States, and the Secretary could withhold the title. However, we submit that the Secretary has not deemed it expedient or wise to involve the Land Department in such "private transactions," and has seen fit to leave the parties to the local courts and local law. For Land Department involvement would not further its **primary function** of supervising the Public Domain and the disposing of "legal title," which of itself is a task of sufficient magnitude.⁶⁹

Considering the foregoing jurisprudence, and its treatment of "rights" held under the Leasing Act as being

⁶⁹ *Best v. Humboldt Mining Co.*, *supra*, footnote 8, page 339, noted the magnitude of the work imposed upon the B. L. M. as respects mining-claim cases, saying: "In the fiscal year 1961 there were a total of 27,228 mining-claim adjudication cases closed during the year. These included 7,457 title-transfer cases (e. g., patent applications and land-disposition conflicts), and approximately 20,000 mining-claim investigations by the Bureau's mining engineers for the purpose of determining validity or invalidity . . ." In the *Boesche* case, notice was taken of "the magnitude and complexity of the leasing program conducted by the Secretary," and reference (footnote 13) made to the fact that: "In many instances there are multiple applications for leases of the same land, sometimes hundreds for the same tract. For example, in a one-month period in 1961 there were 10,742 applications filed in the Santa Fe Land Office alone, many of which affected the same acreage . . ."

similar to inceptive "rights" held under the Public Land Laws, generally, it necessarily follows that many titles to Federal leases have been acquired and dealt with on the basis of this analogy, and, on their holding that local law governs private transactions relating thereto. It is submitted that if the decision below is allowed to stand, and such titles have always been subject to a yet undefined Federal law, then many such titles will have been put in jeopardy and rendered subject to serious question.

D. The *Boesche* Case As It Relates To Private Transactions Had By A Federal Mineral Lessee With Third Parties, Does Not Support The Decision Below.

The majority opinion on rehearing, as above noted, devoted considerable space to what this Court said in the *Boesche* case, concerning the nature of the "right" held by a lessee under the Leasing Act. While the majority did not so state, it is quite apparent that it relied on the language of the *Boesche* decision, to avoid the force and effect of the decisions above cited with reference to the Public Land Laws, generally, and, of course, those specifically interpreting the Leasing Act. We submit that this was an unwarranted and erroneous interpretation of that decision.

In the first place, and most important, the *Boesche* case **did not** involve a question of a Federal lessee's "rights" **as respects a private transaction with third parties**. That case involved **solely** the relationship and rights of a lessee with respect to the United States. The cases above cited which dealt with the nature of the inceptive "rights" under the Public Land Laws, generally, and which acknowledged that such "rights" were "property" as respects third persons, at the same time, specifically **excepted** the United

States. Thus *U. S. v. Buchanan*, *supra*, stated: "but as against **all except the United States he was . . .** clothed with an inceptive title." The sole question involved in *Boesche* was the administrative authority of the Secretary to cancel a lease for administrative error in its issuance.⁷⁰ That this was true, and that this was the sole question decided, is the fact that this Court was careful to point out, that: "**We hold only** that the Secretary has the power to correct administrative errors of the sort involved here by cancellation of leases . . ."

We submit, that in deciding this narrow question, this Court did not hold, nor intend to hold, that a lessee under the Act **had less** rights, or that the "rights" which he had were less in the nature of "property," than those who hold inceptive "rights" under the Public Land Laws generally, all as respects dealings with third persons. As we read the decision, the burden was in showing that the lessee's "rights" fell in the same category as those who held inceptive "rights" under the other Acts, rather than being in the category of one who held a patent to the land, which would have terminated the jurisdiction of the Land Department.

Thus the Court pointed out that the Secretary has such administrative power of cancellation "with respect to other **kinds of interests in public lands,**" and said: "no matter how the **interest conveyed** is denominated the true line of demarcation is whether as a result of the transac-

⁷⁰ It is significant to note the comment in *Boesche* as respects *Pan American Petroleum Corporation v. Pierson*, *supra*, viz.: "Because of a seeming conflict in principle between (this case), and *Pan American Petroleum Corporation v. Pierson* . . . , we brought (this) case here." No further mention was made of that decision.

tion 'all authority or control' over the land has passed . . . or whether the Government continues to possess some measure of control over them." These statements do not deny, but, on the contrary, affirm, that such inceptive "rights" are "kinds of interests in public lands" and acknowledge that such "rights" are an "interest conveyed." And the foregoing cases demonstrate that such "rights" are "property" as respects third persons. Hence, when this Court said that, "a mineral lease does not give the lessee anything approaching the full ownership of a fee patent, nor does it convey an unencumbered estate in the minerals," it did not deny, nor, we submit, intend to infer, that such lessee did not have a "right" which was in every sense "property,"⁷¹ in the same sense that other inceptive "rights" are treated and considered as "property." These statements were made in a context which contemplated the jurisdiction of the Land Department.

The very lease⁷² which the Secretary issued to Wallis states: "Section 1, **Rights of lessee**—The lessee is **granted the exclusive right and privilege** to drill for, mine, extract, remove and dispose of all the oil and gas deposits, . . . in the lands leased, . . . for a period of 5 years, and so long thereafter as oil or gas is produced in paying quantities . . .," and it further states: "Sec. 8. **Heirs and successors-in-interest**.—It is further agreed that each obligation hereunder shall extend to and be binding upon, and **every benefit shall inure to, the heirs, executors, administrators, successors, or assigns** of the respective parties hereto."⁷³

⁷¹ Section 17 of the Leasing Act, as amended in 1935, speaks of "lease owner." App., *infra*, p. 90.

⁷² R. 57.

⁷³ Section 28 of the Leasing Act speaks of "lessee, assignee or beneficiary" of a lease. App., *infra* p. 102.

We ask the Court to compare the foregoing, with the language of the initial mining act (App., *infra*, pp. 106-109) of May 10, 1872, c. 152 § 3 and § 5, 17 Stat. 91, 92; R. S. § 2322 and § 2326; 30 U. S. C. A. 26, 28, which provides in part as follows: "Sec. 26. The locators of all mining locations . . . , **their heirs and assigns**, . . . shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and all of the veins, lodes . . . ," and "Sec. 28 . . . On each claim located after the 10th day of May 1872, and until a patent has been issued therefor, not less than \$100 worth of labor shall be performed . . . each year. On all claims located prior to the 10th day of May 1872, \$10 worth of labor shall be performed . . . until a patent has been issued therefor . . . and upon a failure to comply with these conditions, the claim . . . shall be open to relocation . . . , provided that the original locators, **their heirs, assigns, or legal representatives** have not resumed work . . ." It was this language of the statute and more particularly the references to "heirs and assigns," that served as the basis for acknowledging that mining claims "are subjects of bargain and sale, . . . and the right to sell, transfer, mortgage and inherit is recognized by the courts." Cf. *Forbes v. Gracey*, *supra*, and *Black v. Elkhorn Mining Company*, *supra*. Yet as noted heretofore (*supra*, footnote 43, p. 46), "A mining location . . . is of no higher quality . . . than are unpatented claims under homestead and kindred laws."⁷⁴

⁷⁴ In *Boesche*, while noting that a mineral lease "does not convey an unencumbered estate in the minerals," it referenced to footnote 7, saying: "In contrast, compare the interest of a mining claimant whose location is perfected." Yet the above statement, that it is "of no higher quality . . . than are unpatented claims" generally, and, *Black v. Elkhorn Mining Company*, *supra*, disclose there is no contrast. Moreover, in an opinion rendered by the Solicitor to the Assistant Secretary of Interior, dated

(continued)

We submit that the *Boesche* case did not render inapplicable to the "rights" of a lessee, the decisions relative to inceptive "rights" under the Public Lands Laws, generally, nor did it intend to relegate such "rights" of a lessee to any inferior or different status. And to the extent the opinion below on rehearing so interpreted it, such opinion was in error.

IV. The Majority Opinion Below On Petitions For Rehearing And The Devices Of "Assignments" And "Options."

The second majority opinion makes these statements: "We deal with claims that are, in essence, an alleged 'option' and an alleged 'assignment,' but which, ultimately, must be approved by or registered with the Secretary. We think, therefore, that there is sufficient federal interest for the substantive independence of the federal court . . . * * * It might be said that the absence of a congressional definition of 'option' and 'assignment'—whether they may be oral or arise by operation of trust—implies we should look to the law of the state. But we are impressed by the fact that the [Act] represents a com-

(⁷⁴ cont'd) January 12, 1945 (59 I. D. 4) these statements appear, pages 6, 10: ". . . Accordingly, despite some similarity, prior to discovery, in the characteristics of a lease and a prospecting permit—such as their both being subject to cancellation for cause—it was concluded that leases were, in effect, of a more permanent nature and *vested the lessees with a property right and estate for years in real property*. The rule adopted was said to be 'consistent with the purpose and intent of the leasing law.' * * * . . . On the other hand, a holder of a non-competitive lease has *an immediate leasehold interest in all of the lands subject to the lease for 5 years and a preference right to a new lease thereof prior to discovery and the right, without more, immediately upon discovery, to produce and sell any oil or gas produced . . .*"

prehensive scheme of federal regulation. Besides the policy directed at opposing monopoly . . . , Congress has recently expressed concern over a potentially dangerous slackening in exploration for development of domestic reserves . . . * * * It is clear that the [Act] recognizes the devices of 'assignments' and 'options' as concomitants to the public policy against monopoly . . . and . . . the public policy towards development . . . and increasing our domestic reserves." The foregoing is the essence of the predicate upon which the second opinion concluded that "the interest of the United States is directly affected" by these private transactions, and, that "this is an area for uniformity."

Several quick observations are suggested. As respects the failure of the Act to define "the terms 'assignment' and 'option'"—is this not a matter for the Secretary, under his delegated authority to administer the Act?⁷⁵ Considering the fact (as stated in the *Boesche* case) that in the debates in Congress concerning the Leasing Act "conservation through control was the dominant theme," and the further fact that the term "assignment" was in the original statute enacted in 1920—how could "recent concern . . . expressed by Congress" in 1960 over our "do-

⁷⁵ As respects the Leasing Act, and definition of terms used therein, *California Company v. Udall*, 296 F. 2d 384 (C. C. A., D. C., 1961), says, page 388: "An administrative official charged with the duty of administering a specific statute has a duty to determine as an initial and administrative matter the meanings of terms in that statute." If the Secretary thought that the defining of the terms "assignment" and "option" in some way furthered, or were material to, the "policies" which the majority finds present, it was his province to do so. Yet the Secretary has not seen fit to define these terms, thus indicating that private contracts of "assignment" or "option," do not "directly affect" the interest of the United States, and are therefore immaterial to the "policies" of the Act.

mestic reserves," have any bearing upon the original use of the word "assignment"?

The above quoted extracts from the second majority opinion, must be considered in the following context: Wallis, and Wallis alone, applied to the B. L. M. for the issuance of the lease, and, the lease was granted to him. At that time, and in connection with the issuance of the lease, the Secretary is presumed to have given consideration to all "policy" matters, and he is presumed to have concluded that the "policies" of the Act would be furthered by the issuance of the lease. In this light, the lease issued to Wallis. These suits seek a forced transfer of all or a portion of this lease. Local law has not said, and does not say, that transfers cannot, or could not, be made by Wallis to either of these plaintiffs. Local law does not prohibit or interdict transfers of Federal leases. Local law has simply said, in line with its public policy as reflected by the local Statute of Frauds, that the **particular private transactions** these plaintiffs had with Wallis, did not accomplish a transfer of the lease. Under these circumstances, how can it be said the "policy" of the Act is frustrated by this **negative** action of local law? Where does this "affect the interests of the United States"? How does uniformity in the decisions on these transactions further the policy, or, lack of uniformity frustrate the policy? The majority gives no answers to these specific questions, it gives only general conclusions. But in the final analysis, if "uniformity" in these matters is deemed essential, is not this the province of the Secretary? And is not his failure to take steps to require "uniformity" in these transactions, by appropriate regulations, evidence of his decision, and conclusion, that "uniformity" is not required? Not only

has the Secretary indicated that "uniformity" is not required, by refusing to adopt appropriate regulations, but, on the contrary and as we have heretofore shown, the Land Department has avoided involvement in these private disputes and, instead, relegated the parties to local courts and local law, all in accordance with the policy laid down by Congress in connection with the Public Land Laws, generally.

A. Section 30 Of The Act Relative To The Secretary's Approval Of Assignments Or Subleases, As Interpreted By The Decision Below, Is Contrary To Past Decisions Interpreting The Leasing Act, And, Is Contrary To Sec. 30 (a) Of The Act.

The second opinion, in stating that these suits deal with a claim that is, "in essence, . . . an alleged 'assignment', but which, ultimately, must be **approved** by . . . the Secretary," is completely in error, and fails to give proper consideration to § 30 (a) (App., *infra*, p. 104) of the Act. Thus "assignments" of Federal oil and gas leases are **no longer governed** by § 30 of the Act, **insofar as discretionary authority** of the Secretary is concerned, as distinguished from merely an **administrative function**. This is manifest from the Committee Report to Congress⁷⁶ concerning the proposed 1946 amendment, which added § 30 (a) to the Act. This states, p. 4: "Section 30 (a) is added to the Mineral Leasing Act. This section is designed **to apply to oil and gas leases only, and to except such leases from section 30** which will then apply to leases of minerals **other**

⁷⁶ Report of the Committee on Public Lands, to the House of Representatives; on "Amending The Mineral Leasing Act Of February 25, 1920, As Amended," Report No. 2446, 79th Congress, 2nd Session, H. Repts., 79-2, vol. 7-98.

than oil and gas. The section is designed to relieve the Department of the Interior of considerable administrative detail in approving assignments of leases and should eliminate much of the delay now incident to assignments or other transfer of leases." Here, then, is the clear expression of the intent of Congress that § 30 of the Act does **not apply** to the lease here involved, in light of § 30 (a), yet the opinions below relied, in the main, upon the erroneous assumption that § 30 applied, and the fact that an "assignment" of a lease "must be approved by . . . the Secretary."

As the Act was originally enacted, there was no specific statutory circumscribing of the Secretary's authority as respects the requirement of § 30 that: "No lease issued under the authority of this Act shall be assigned or sublet, except with the consent of the Secretary of the Interior." (App., *infra*, p. 103). In *Williams v. U. S.*, *supra*, the Court, in speaking of the requirement of a statute that the certification after selection of lands by a State "be approved by the Secretary" said: "It gives him no mere arbitrary discretion . . ." Thus the **original requirement** of § 30 of the Act, that an assignment or sublease of a lease must be approved by the Secretary, gave him no "arbitrary" discretion, but his action must have had a reasonable relation to the interests of the United States, the furtherance of the policy of the Act, and, an efficient administration of the Act. It should be noted that the Secretary's authority, as respects assignments and subleases, was "negative" in that he could only **refuse to approve**, he could not **require or force** an assignment or sublease of a lease. However broad the Secretary's authority and discretion may have been under § 30, as respects such required "approval", we submit that it has been entirely

circumscribed, by the addition, in 1946, of § 30 (a) of the Act, which provides in part: "Sec. 30 (a). Notwithstanding anything to the contrary in section 30 hereof . . . The Secretary shall disapprove the assignment or sublease **only** for lack of qualification of the assignee or sublessee or for lack of sufficient bond." (App., *infra*, pp. 104-105.) Considering the fact that the Act allows the owner of a lease to "assign" the lease, and the Secretary may **only** disapprove **for these two restricted reasons**, we are forced to ask, where is there any interstitial authority?⁷⁷ We submit that by the addition of § 30 (a) to the Act, the sole relevancy which an "assignment" has to the "policy," as respects "monopolies," or, "domestic reserves," has to do with the question of the extent of the "acreage holdings" of

⁷⁷ It is interesting to note that when the previous "broad discretion" of the Secretary as respects "approval" under Sec. 30 as originally enacted, was to be narrowly circumscribed by the proposal of Sec. 30 (a), the Secretary apparently had no apprehensions about the "policy" of the Act suffering. This is disclosed by proceedings in Congress, when the 1946 Amendment was before the House, for final action after being reported by the joint committee, to-wit: "Mr. Fernandez. Mr. Speaker, this bill, S. 1236, as now approved by the conferees . . . * * * The second of these amendments did not meet with the full approval of the Department. The amendment *was intended to facilitate the assignment of leases in order to relieve the bottleneck in the Department of the Interior*, which has created a backlog of unapproved leases and which necessarily tends to impede and delay discovery of new petroleum reserves. The Department was *fearful that assignments could be so conditioned as to relieve assignees from some of the obligations of the original lessee, and to fully safeguard the Government and to meet the criticism of the Department*, the conferees on the part of the House drafted an amendment providing that upon approval of any assignment, the assignee must be bound by the obligations of the lease to the same extent as if he were the original lessee. This latter amendment was approved by the Department and was accepted by the Senate conferees and is now incorporated in the amendments." 79th Congress, 2nd Session, Vol. 92 Congressional Record, page 10222 (1946).

the proposed assignee. This is specifically provided for in § 30 (a), and this completely refutes the holding of the second majority opinion. In the Congressional comment last noted, we direct the Court's attention to the statement, to-wit: "and to **fully safeguard the Government** and to meet the criticism of the Department,"—does not this completely negative interstitial authority?⁷⁸

Even as respects § 30 of the Act, prior to the 1946 addition of § 30 (a), the decisions interpreting § 30 did not attach any "policy" consideration to the requirement of "approval" by the Secretary, as the second majority opinion **now asserts** even with § 30 (a) added to the Act.

As a preface to a consideration of the decisions on this phase of the Act, we should first like to discuss the case of *Manuel v. Wulff*, 152 U. S. 505 (1894). This case concerned the "policy" of the mining statute, of restricting the benefits of the statute to "citizens" as opposed to "aliens." It was a contest over a mining claim, both parties claiming they had validly located the claim. It developed that defendant Manuel's claim had been initially located by his brother and he had in turn conveyed the claim to Manuel, who was an alien. The lower court held that since Manuel was not a "citizen" at the time of the purported conveyance to him, such purported conveyance amounted to an abandonment of the location by the grantor. In reversing, this Court said, page 511: ". . . , we are of

⁷⁸ The Committee Report referred to, *supra*, p. 78, fn. 77, discloses in connection with the proposed § 30 (a), that the Secretary of the Interior was complaining (p. 7) because it limited the Secretary's discretion to "disapprove" assignments "for good cause." And the foregoing statement to the House, by Rep. Fernandez, shows that Congress clearly intended to deny the Secretary any "discretion," as respects approval of assignments.

the opinion on this record that, as Alfred Manuel [the brother] was a citizen, if his location was valid, his claim passed to his grantee [defendant], not by operation of law, **but by virtue of his conveyance**, and that the incapacity of the latter to take and hold by reason of alienage was, under the circumstances, **open to question by the government only.**" Here then is a case of the "policy" of the statute being given consideration and "effect," in a case involving a private transaction relating to an inceptive "right," and **this Court reversed**, holding that the Act has no application to this private transaction, and that the "policy" is a matter for the government to enforce.⁷⁹ Such has been the rationale of the decisions relating to § 30 of the Leasing Act.

In one of the first cases under the Act, the same question was presented, where the plaintiff was attempting to enforce a "grubstake" agreement made with the grantee of an oil permit issued under the Leasing Act. The agreement was made prior to the issuance of the permit, but enforcement by "equitable trust" was sought, as respects the issued permit. We refer to *Isaacs v. De Hon*, 11 F. (2d) 943 (C. C. A., 9th, 1926). Defenses were asserted that (1) plaintiff did not allege he was a "citizen,"

⁷⁹ As respects the "policy" toward "aliens" which inheres in the Public Land Laws generally, "Bank of America," 59 I. D. 412, 414 (1947), contains this statement: "It is the general policy of the laws relating to the disposition of public lands and interests therein that aliens shall not be favored with participation in the bounty thus to be obtained from the United States. This pervading policy is to be found, for example, in the homestead laws . . . , the timber and stone laws . . . , the desert-land laws . . . , the laws pertaining to underground water reclamation grants . . . , the Taylor Grazing Act as it relates to the grazing of stock in grazing districts . . . , and the mining laws . . . It finds expression also in section 1 of the Mineral Leasing Act, . . ."

and (2) "permits," under the regulations, could only be assigned with the consent of the Secretary. The Court rejected both defenses, holding that the question of alienage **could only be complained of by the sovereign**, and, while it might be that plaintiff would "lose the fruits of this litigation by the refusal of the Secretary to approve the assignment," nevertheless the Court would hold defendant "to the obligations in his grubstake contract."

In *Witbeck v. Hardeman*, *supra*, the same defense was asserted as respects the required Secretary's approval of an assignment, and the Court said, page 453: "... This restriction on transfer applies to voluntary transfers, and will hardly be deemed applicable in case of death, bankruptcy, or **court decree**. But the difficulty is met by the just assumption that the Secretary intends that leases and permits shall go to those whom the law entitles to them, and when a transfer is ordered to accomplish this his consent is to be implied, and may be compelled if refused. If such a transfer be decreed, he will no doubt, on request, enter his consent thereto, and make necessary substitution of bond, and do all else that is appropriate to perfect the transfer..." While this Court affirmed on other grounds (*supra*, p. 62) by ruling on the merits, it does seem that if it considered the foregoing ruling to be incorrect, it would have so noted. *Alaska Consolidated Oil Fields v. Rains*, *supra*, quoted the foregoing extract from the *Witbeck* case, with approval. In *Gibbons v. Pan American Petroleum Corporation*, 262 F. (2d) 852 (C. C. A., 10th, 1958), the Court said, page 854: "The fact that the lease assignments were unapproved by the [B. L. M.] is of no moment, since the assignee could not avoid their obligations by simply not offering them for approval," citing *Blackner v.*

McDermott, supra, and *Oldland v. Gray, supra*, the latter case stating at page 415: "... As we have said, the rights of the parties here do not arise out of the federal act. They have their genesis in and derive their vitality from an agreement between the parties, which unless contrary to declared public policy, are enforceable in accordance with its terms and conditions and applicable law . . ." Also, the recent decision of *Bolack v. Underwood, supra*, gave absolutely no consideration to the question of the Secretary's required approval of an assignment and held there was no federal interest involved in a private dispute over the ownership of a Federal Lease.

The foregoing decisions interpreting § 30 of the Act, are entirely in accord with this Court's holding in *Manuel v. Wulff, supra*, and it and the foregoing cases stand for the propositions that (1) private contracts or transactions concerning these "rights," are not governed by the Act, nor the policy thereof, (2) as respects the Act and its "policy," the Government's rights or interests are to be asserted by the Secretary and when such private contracts are submitted for his approval, and (3) none of these cases attaches any importance or significance to § 30 of the Act, and its requirement of approval of "assignments," as respects such private contracts or transactions, which stand on their own merits, as contracts.

We submit that the foregoing discloses that the second majority opinion was entirely in error, as respects the significance it attached to the use of the word "assignment" in the Act, and the further requirement of approval of "assignments" as provided in § 30. **Since the Act does not even require filing of "options" with the Secretary, much less his "approval" thereof, but only requires semi-**

annual filings by the optionee giving certain data as respects all "options" held by such optionee (Cf. Sec. 27 of the Act, App., *infra*, p. 99), the foregoing cases are even more decisive as respects the "importance" attached by the majority to the reference, or provision in the Act, concerning "options."

B. Recognition By The Leasing Act Of "Options" As Concomitants To The Public Policy Against Monopoly.

The second opinion merely lumps together "assignments" and "options" as "concomitants of the public policy against monopoly" and makes absolutely no distinction between these two devices. Yet the history of the Leasing Act, and more clearly the circumstances which brought about the first legislation in 1946 with reference to "options," . . . discloses that there is not only a difference between "options" and "assignments" under the Leasing Act, but also that "options" have been relegated to a position of lesser importance.

In referring to "options" as concomitants to the "public policy" against "monopoly," this can be considered as true only by treating it in its broadest sense. **Yet**, we submit that, when "options" are considered in light of the circumstances and background that brought about legislative regulations thereof, the majority opinion is in error as to the significance which it attaches thereto.

There is an excellent article⁸⁰ by one of the leading authorities in this country on "public lands," which, to-

⁸⁰ "Oil And Gas Leases On United States Government Lands," Ross L. Malone, Jr., 2nd Ann. Institute on Oil and Gas Law and Taxation, Southwestern Legal Foundation, page 309, 324, *et seq.*

gether with an opinion of the Solicitor to the Assistant Secretary of the Interior,⁸¹ reflects the history behind the 1946 amendment to § 27 of the Leasing Act (Act of August 8, 1946). Briefly summarized, these authorities are to the following effect: Originally § 27 of the Leasing Act provided that "no person, association or corporation, shall take or hold at one time oil or gas leases or permits exceeding in the aggregate" a certain limited number of acres of land in any one State. The Land Department held that acreage included in prospecting permits covered by operating agreements would not be charged against the operator, as respects the acreage limitations of the Act. The issuance of prospecting permits was eliminated in 1935, and in lieu thereof, the Act provided for issuance of noncompetitive leases on lands not within a known producing structure. Initially this attitude as respects prospecting permits was applied to noncompetitive leases until 1938, when the Department ruled that an operating contract with reference to such a lease would be charged against the operator's acreage holdings (letter to LeRoy H. Hines, dated April 19, 1938, 1708342, "L" MB). In order to avoid and circumvent the effect of this ruling, the scheme was devised of taking options to acquire leases upon their issuance on the theory that this was not an interest in real estate, and would, therefore, not be charged against the acreage holdings of the optionee. There was no official ruling from the Department but reports indicated that there were conflicting opinions among the officials thereof as to the chargeability of options under § 27 of the Act. Considerable sums of money had been invested by the industry in "options", designed, primarily, to permit the optionee to go upon land and conduct geological and geophysical ex-

⁸¹ 59 I. D. 4 (1945).

ploration, and, with, of course, the right to ultimately acquire a lease from the holder thereof.

It was in recognition both of the evasiveness of the device of "options," and, the huge sums invested therein, that brought about Congressional recognition of "options" in the 1946 amendment (App., *infra*, p. 92) to Sec. 27 of the Act, and, with **an acreage limitation thereon**, when taken for the purpose of geological or geophysical exploration, such permissible holding of "options" not to count against the acreage limitation on holdings of leases. Besides limiting the term of an "option" to two years without the approval of the Secretary, the Act did not require that "options" be filed with, or approved by, the Secretary, but only that an optionee should file a sworn declaration, semi-annually, with the Secretary, giving certain data with reference to **all options** held by the optionee within each respective State, which data were to include the number of acres covered by each "option". It will thus be seen that the recognition and regulation of "options", was primarily brought about as a means of buttressing the provisions of the Act imposing acreage limitations on control of leases, and, at the same time, facilitating geological and geophysical exploration of lands.⁸²

We wish to impress upon the Court the fact that the Act did not require the filing of option agreements

⁸² The Committee Report to Congress, on the proposed 1946 Amendment to Sec. 27 of the Act (*supra*, p. 76 footnote 76) has only this comment, with respect to the reference to "options", P. 3: "Modern technology of the industry is recognized by permitting the taking of nonrenewable options for geological or geophysical examinations of prospective areas, such options being limited to a duration of 2 years and to an area of not more than 100,000 acres in any one state. Adequate provision is made for semi-annual reporting of such options held by each optionee . . ."

with the Secretary, much less his approval (except as to a term in excess of two years), but, only required the furnishing of certain data, concerning all options so held. We submit that to the extent that options could be said to be a "concomitant" of the "policy" of the Act as opposed to monopolies, the foregoing discloses that the Congressional recognition of the device of "options" in no way requires the conclusion of the majority below that "uniformity" is necessary in the law applicable to such agreements. We submit that there is even less reason in this respect, for the conclusion so reached, than in the case of "assignments" of leases, and, we further submit that we have adequately demonstrated the error of the second opinion in its similar conclusion as to "assignments."

* * * * *

In neither of the two opinions below, did the majority find any error in the manner in which District Judge J. Skelly Wright resolved the issues in accordance with local law, assuming local law were applicable thereto. The fact that he was entirely correct in this respect, is manifest from the decision by the State Supreme Court in *Hayes v. Muller*, 245 La. 356 (p. 373 On Rehearing), 158 So. (2d) 191 (1963), decided while this case was pending in the Court of Appeal. Moreover, Circuit Court Judge Wisdom held that District Judge Wright, had correctly decided the case. Judges Wright and Wisdom were both trained in the Civil Law, which prevails locally.

H. CONCLUSION.

For the reasons stated, the decision of the majority below should be set aside, the decision of the District Court should be reinstated as the judgment of this Court, and

the matter remanded for further proceedings in accordance therewith.

Respectfully submitted,

C. ELLIS HENICAN,
MURRAY F. CLEVELAND,
Suite 2601, 225 Baronne Street,
New Orleans, Louisiana 70112;

H. M. HOLDER,
1300 Beck Building,
Shreveport, Louisiana 71101,
Attorneys for Petitioner.

CERTIFICATE OF SERVICE.

I, C. Ellis Henican, hereby certify that a copy of the foregoing Brief For Floyd A. Wallis, was served upon Counsel of Record, representing Respondent, Patrick A. McKenna, and, representing Respondent, Pan American Petroleum Corporation, and the Solicitor General, Department of Justice, Washington 25, D. C., by enclosing each such copy in an envelope, duly addressed to each such Counsel of Record and the Solicitor General, at his post office address, with the required air mail first class postage prepaid and affixed thereto, and depositing same in the United States Post Office at New Orleans, La., on this _____ day of December, 1965.

Counsel of Record for Petitioner.

APPENDIX.

Additional Statutes Involved.

1. Mineral Leasing Act of 1920:¹

(Act of Feb. 25, 1920; 30 U.S.C. 181, et seq.)

Sec. 1 That deposits of coal, phosphate, sodium, potassium, oil, oil shale, or gas, and lands containing such deposits owned by the United States, including those in national forests, but excluding lands acquired under the Act known as the Appalachian Forest Act, approved March 1, 1911 (36 Stat. 961), and those in incorporated cities, towns, and villages and in national parks and monuments, those acquired under other Acts subsequent to February 25, 1920, and lands within the naval petroleum and oil-shale reserves, except as hereinafter provided, shall be subject to disposition in the form and manner provided by this Act to citizens of the United States, or to associations of such citizens, or to any corporation organized under the laws of the United States, or of any State or Territory thereof, or in the case of coal, oil, oil shale, or gas, to municipalities. Citizens of another country, the laws, customs, or regulations of which deny similar or like privilege to citizens or corporations of this country, shall not by stock ownership, stock holding, or stock control, own any interest in any lease acquired under the provisions of this Act.

The United States reserves the ownership of and the right to extract helium from all gas produced from lands

¹ Wallis' oral agreement with McKenna, was had in March 1954, and this was confirmed by letter agreement in Dec. of 1954. The option agreement with Pan Am was in March, 1955. *Unless otherwise noted*, these provisions of the Act are set forth as they read, at the time of these agreements. Only Sec. 27 was amended by the Act of Aug. 2, 1954 and it is set forth prior to, and, after this amendment.

leased or otherwise granted under the provisions of this Act, under such rules and regulations as shall be prescribed by the Secretary of the Interior: *Provided further*, That in the extraction of helium from gas produced from such lands it shall be so extracted as to cause no substantial delay in the delivery of gas produced from the well to the purchaser thereof. (30 U.S.C. 181.)

Sec. 17 (as amended by Act of Aug. 21, 1935) * * *

Any lease issued after August 21, 1935 under the provisions of this section, except those earned as a preference right as provided in section 14 of this title, shall be subject to cancelation by the Secretary of the Interior after thirty days' notice upon the failure of the lessee to comply with any of the provisions of the lease, unless or until the land covered by any such lease is known to contain valuable deposits of oil or gas. Such notice in advance of cancelation shall be sent the lease owner by registered letter directed to the lease owner's record post-office address, and in case such letter shall be returned as undelivered, such notice shall also be posted for a period of thirty days in the United States Land Office for the district in which the land covered by such lease is situated, or in the event that there is no district land office for such leased land, then in the post office nearest such land. Leases covering lands known to contain valuable deposits of oil or gas shall be canceled only in the manner provided in section 31 of this Act. (30 U.S.C. 226.)

Sec. 18 (as originally enacted). That upon relinquishment to the United States, filed in the General Land Office within six months after the approval of this Act, of all right, title, and interest claimed and possessed prior

to July 3, 1910, and continuously since by the claimant or his predecessor in interest under the pre-existing placer mining law to any oil or gas bearing land upon which there has been drilled one or more oil or gas wells to discovery embraced in the Executive order of withdrawal issued September 27, 1909, and not within any naval petroleum reserve, and upon payment as royalty to the United States of an amount equal to the value at the time of production of one-eighth of all the oil or gas already produced except oil or gas used for production purposes on the claim, or unavoidably lost, from such land, the claimant, or his successor, if in possession of such land, undisputed by any other claimant prior to July 1, 1919, shall be entitled to a lease thereon from the United States for a period of twenty years, at a royalty of not less than 12½ per centum of all the oil or gas produced except oil or gas used for production purposes on the claim, or unavoidably lost: Provided, * * *

Upon the delivery and acceptance of the lease, as in this section provided, all suits brought by the Government affecting such lands may be settled and adjusted in accordance herewith and all moneys impounded in such suits or under the Act entitled "An Act to amend an Act entitled 'An Act to protect the locators in good faith of oil and gas lands who shall have effected an actual discovery of oil or gas on the public lands of the United States, or their successors in interest,' approved March 2, 1911," approved August 25, 1914 (Thirty-eighth Statutes at Large, page 708), shall be paid over to the parties entitled thereto. In case of conflicting claimants for leases under this section, the Secretary of the Interior is authorized to grant leases to one or more of them as shall be deemed just. All

leases hereunder shall inure to the benefit of the claimant and all persons claiming through or under him by lease, contract, or otherwise, as their interests may appear; subject, however, to the same limitation as to area and acreage as is provided for claimant in this section: Provided, * * * (30 U.S.C. 227.)

Sec. 27 (as amended by Act of Aug. 8, 1946) No person, association, or corporation, except as herein provided, shall take or hold coal, phosphate, or sodium leases or permits during the life of such leases in any one State, exceeding in the aggregate acreage two thousand five hundred and sixty acres for each of said minerals; and no person, association, or corporation, except as herein provided, shall take or hold at one time oil or gas leases exceeding in the aggregate fifteen thousand three hundred and sixty acres granted hereunder in any one State. No person, association, or corporation shall take or hold at one time any interest or interests as a member of an association or associations or as a stockholder of a corporation or corporations holding a lease or leases, permit or permits, under the provisions hereof, which, together with the area embraced in any direct holding of a lease or leases, permit or permits, under this Act, or which, together with any other interest or interests as a member of an association or association or as a stockholder of a corporation or corporations holding a lease or leases, permit or permits, under the provisions hereof for any kind of minerals hereunder, exceeds in the aggregate an amount equivalent to the maximum number of acres of the respective kinds of minerals allowed to any one lessee or permittee under this Act. For the purpose of this Act, no contract for development and operation of any lands leased hereunder, whether

or not coupled with an interest in such lease, nor any lease or leases owned in common by two or more persons, shall be deemed to create a separate association under this section between or among such contracting parties, or the persons owning such lease or leases in common, but the proportionate interest of each such person shall be charged against the total acreage permitted to be held by such person under this Act: *Provided*, That the total acreage so held in common by two or more persons shall not exceed, in the aggregate, an amount equivalent to the maximum number of acres of the respective kind of minerals allowed to any one lessee or permittee under this Act. The interest of an optionee under a nonrenewable option to purchase or otherwise acquire one or more oil or gas leases (whether then or thereafter issued), or any interest therein, when taken for the purpose of geological or geophysical exploration, shall not, prior to the exercise of such option, be a taking or holding or control under the acreage limitation provisions of any section of this Act. No such option shall be entered into after June 1, 1946, for a period of more than two years, without the prior approval of the Secretary of the Interior, and no person, association, or corporation shall hold at one time such options of more than one hundred thousand acres in any one State: *Provided, however*, That nothing in this section shall be construed to invalidate options taken prior to June 1, 1946, and on which such geological or geophysical exploration has been actually made, and which are exercised within two years after the passage of this Act. Each holder of any such option shall file with the Secretary within ninety days after the 30th day of June and the 31st day of December in each year a statement under oath showing as of said date (1) name of optionor and serial number of lease or application for lease,

(2) date and expiration date of each option, (3) number of acres covered by each option, and (4) aggregate number of options held in each State and total acreage subject to said options in each State. If any interest in any lease is owned or controlled, directly or indirectly, by means of stock or otherwise, in violation of any of the provisions of this Act, the lease may be canceled, or the interest so owned may be forfeited, or the person so owning or controlling the interest may be compelled to dispose of the interest, in any appropriate proceeding instituted by the Attorney General. Such a proceeding shall be instituted in the United States district court for the district in which the leased property or some part thereof is located or in which the lease owner may be found, except that any ownership or interest forbidden in this Act which may be acquired by descent, will, judgment, or decree may be held for two years and not longer after its acquisition. Nothing herein contained shall be construed to limit sections 18, 18a, 19, and 22 or to prevent any number of lessees under the provisions of this Act from combining their several interests so far as may be necessary for the purposes of constructing and carrying on the business of a refinery, or of establishing and constructing as a common carrier a pipe line or lines of railroads to be operated and used by them jointly in the transportation of oil from their several wells, or from the wells of other lessees under this Act, or the transportation of coal or to increase the acreage which may be acquired or held under section 17 of this Act: *Provided*, That any combination for such purpose or purposes shall be subject to the approval of the Secretary of the Interior on application to him for permission to form the same. Except as in this Act provided, if any of the lands or deposits leased under the provisions of this Act shall be subleased,

trusteed, possessed, or controlled by any device permanently, temporarily, directly, indirectly, tacitly, or in any manner whatsoever, so that they form a part of or are in anywise controlled by any combination in the form of an unlawful trust, with the consent of the lessee, or form the subject of any contract or conspiracy in restraint of trade in the mining or selling of coal, phosphate, oil, oil shale, gas, or sodium entered into by the lessee, or any agreement or understanding, written, verbal, or otherwise, to which such lessee shall be a party, of which his or its output is to be or become the subject, to control the price or prices thereof or of any holding of such lands by any individual, partnership, association, corporation, or control in excess of the amounts of lands provided in this Act, the lease thereof shall be forfeited by appropriate court proceedings. (30 U.S.C. 184.)

Sec. 27 (as amended by Acts of June 1, and June 3, 1948) No person, association or corporation, except as herein provided, shall take or hold coal or sodium leases or permits during the life of such lease in any one State, exceeding in the aggregate acreage five thousand one hundred and twenty acres for each of said minerals: *Provided*, That the Secretary of the Interior may, in his discretion where it is necessary in order to secure the economic mining of sodium compounds leasable under this Act, permit a person, association, or corporation to take or hold sodium leases or permits for up to fifteen thousand three hundred and sixty acres in any one State. No person, association, or corporation, except as herein provided, shall take or hold at one time oil or gas leases exceeding in the aggregate fifteen thousand three hundred and sixty acres granted hereunder in any one State; and no person, asso-

ciation, or corporation shall take or hold at one time phosphate leases or permits exceeding in the aggregate five thousand one hundred and twenty acres in any one State, and exceeding in the aggregate ten thousand two hundred and forty acres in the United States. No person, association, or corporation shall take or hold at one time any interest or interests as a member of an association or associations or as a stockholder of a corporation or corporations holding a lease or leases, permit or permits, under the provisions hereof, which, together with the area embraced in any direct holding of a lease or leases, permit or permits, under this Act, or which, together with any other interest or interests as a member of an association or associations or as a stockholder of a corporation or corporations holding a lease or leases, permit or permits, under the provisions hereof for any kind of minerals hereunder, exceeds in the aggregate an amount equivalent to the maximum number of acres of the respective kinds of minerals allowed to any one lessee or permittee under this Act. For the purpose of this Act, no contract for development and operation of any lands leased hereunder, whether or not coupled with an interest in such lease, nor any lease or leases owned in common by two or more persons, shall be deemed to create a separate association under this section between or among such contracting parties, or the persons owning such lease or leases in common, but the proportionate interest of each such person shall be charged against the total acreage permitted to be held by such person under this Act: *Provided*, That the total acreage so held in common by two or more persons shall not exceed, in the aggregate, an amount equivalent to the maximum number of acres of the respective kind of minerals allowed to any one lessee or permittee under this Act. The interest

of any optionee under a nonrenewable option to purchase or otherwise acquire one or more oil or gas leases (whether then or thereafter issued), or any interest therein, when taken for the purpose of geological or geophysical exploration, shall not, prior to the exercise of such option, be a taking or holding or control under the acreage limitation provisions of any section of this Act. No such option shall be entered into after June 1, 1946, for a period of more than two years, without the prior approval of the Secretary of the Interior, and no person, association, or corporation shall hold at one time such options of more than one hundred thousand acres in any one State: *Provided, however,* That nothing in this section shall be construed to invalidate options taken prior to June 1, 1946, and on which such geological or geophysical exploration has been actually made, and which are exercised on or before August 8, 1950. Each holder of any such option shall file with the Secretary within ninety days after the 30th day of June and the 31st day of December in each year a statement under oath showing as of said dates (1) name of optionor and serial number of lease or application for lease, (2) date and expiration date of each option, (3) number of acres covered by each option, and (4) aggregate number of options held in each State and total acreage subject to said options in each State. If any interest in any lease is owned or controlled, directly or indirectly, by means of stock or otherwise, in violation of any of the provisions of this Act, the lease may be canceled, or the interest so owned may be forfeited, or the person so owning or controlling the interest may be compelled to dispose of the interest, in any appropriate proceeding instituted by the Attorney General. Such a proceeding shall be instituted in the United States district court for the district in which the

leased property or some part thereof is located or in which the lease owner may be found, except that any ownership or interest forbidden in this Act which may be acquired by descent, will, judgment, or decree may be held for two years and not longer after its acquisition. Nothing herein contained shall be construed to limit sections 18, 18a, 19, and 22 or to prevent any number of lessees under the provisions of this Act from combining their several interests so far as may be necessary for the purposes of constructing and carrying on the business of a refinery, or of establishing and constructing as a common carrier a pipe line or lines of railroads to be operated and used by them jointly in the transportation of oil from their several wells, or from the wells of other lessees under this Act, or the transportation of coal or to increase the acreage which may be acquired or held under section 17 of this Act: *Provided*, That any combination for such purpose or purposes shall be subject to the approval of the Secretary of the Interior on application to him for permission to form the same. Except as in this Act provided, if any of the lands or deposits leased under the provisions of this Act shall be subleased, trusteeed, possessed, or controlled by any device permanently, temporarily, directly, indirectly, tacitly, or in any manner whatsoever, so that they form a part of or are in anywise controlled by any combination in the form of an unlawful trust, with the consent of the lessee, or form the subject of any contract or conspiracy in restraint of trade in the mining or selling of coal, phosphate, oil, oil shale, gas, or sodium entered into by the lessee, or any agreement or understanding, written, verbal, or otherwise, to which such lessee shall be a party, of which his or its output is to be or become the subject, to control the price or prices thereof or of any holding of

such lands by any individual, partnership, association, corporation, or control in excess of the amounts of lands provided in this Act, the lease thereof shall be forfeited by appropriate court proceedings. (30 U.S.C. 184.)

Sec. 27 (as amended by Act of Aug. 2, 1954) No person, association, or corporation, except as herein provided, shall take or hold coal or sodium leases or permits during the life of such lease in any one State, exceeding in the aggregate acreage five thousand one hundred and twenty acres for each of said minerals: *Provided*, That the Secretary of the Interior may, in his discretion where it is necessary in order to secure the economic mining of sodium compounds leasable under this Act, permit a person, association, or corporation to take or hold sodium leases or permits for up to fifteen thousand three hundred and sixty acres in any one State. No person, association, or corporation, except as herein provided, shall take or hold at one time oil or gas leases exceeding in the aggregate forty-six thousand and eighty acres granted hereunder in any one State, except that in the Territory of Alaska no person, association, or corporation, except as herein provided, shall take or hold at one time oil or gas leases exceeding in the aggregate one hundred thousand acres granted hereunder; and no person, association, or corporation shall take or hold at one time phosphate leases or permits exceeding in the aggregate five thousand one hundred and twenty acres in any one State, and exceeding in the aggregate ten thousand two hundred and forty acres in the United States. No person, association, or corporation shall take or hold at one time any interest or interests as a member of an association or associations or as a stockholder of a corporation or corporations holding a lease or leases, permit or

permits, under the provisions hereof, which, together with the area embraced in any direct holding of a lease or leases, permit or permits, under this Act, or which, together with any other interest or interests as a member of an association or associations or as a stockholder of a corporation or corporations holding a lease or leases, permit or permits under the provisions hereof for any kind of minerals hereunder, exceeds in the aggregate an amount equivalent to the maximum number of acres of the respective kinds of minerals allowed to any one lessee or permittee under this Act. For the purpose of this Act, no contract for development and operation of any lands leased hereunder, whether or not coupled with an interest in such lease, nor any lease or leases owned in common by two or more persons, shall be deemed to create a separate association under this section between or among such contracting parties, or the persons owning such lease or leases in common, but the proportionate interest of each such person shall be charged against the total acreage permitted to be held by such person under this Act: *Provided*, That the total acreage so held in common by two or more persons shall not exceed, in the aggregate, an amount equivalent to the maximum number of acres of the respective kind of minerals allowed to any one lessee or permittee under this Act. The interest of an optionee under a nonrenewable option to purchase or otherwise acquire one or more oil or gas leases (whether then or thereafter issued), or any interest therein, shall not, prior to the exercise of such option, be a taking or holding or control under the acreage limitations provisions of any section of this Act. No such option shall be entered into for a period of more than three years, without the prior approval of the Secretary of the Interior, and no person, association, or corpora-

tion shall hold at one time such options of more than two hundred thousand acres in any one State. Each holder of any such option shall file with the Secretary within ninety days after the 30th day of June and the 31st day of December in each year a statement under oath showing as of said dates (1) name of optionor and serial number of lease or application for lease, (2) date and expiration date of each option, (3) number of acres covered by each option, and (4) aggregate number of options held in each State and total acreage subject to said options in each State. If any interest in any lease is owned or controlled, directly or indirectly, by means of stock or otherwise, in violation of any of the provisions of this Act, the lease may be canceled, or the interest so owned may be forfeited, or the person so owning or controlling the interest may be compelled to dispose of the interest, in any appropriate proceeding instituted by the Attorney General. Such a proceeding shall be instituted in the United States district court for the district in which the leased property or some part thereof is located or in which the lease owner may be found, except that any ownership or interest forbidden in this Act which may be acquired by descent, will, judgment, or decree may be held for two years and not longer after its acquisition. Nothing herein contained shall be construed to limit sections 18, 18a, 19, and 22 or to prevent any number of lessees under the provisions of this Act from combining their several interests so far as may be necessary for the purposes of constructing and carrying on the business of a refinery, or of establishing and constructing as a common carrier a pipe line or lines of railroads to be operated and used by them jointly in the transportation of oil from their several wells, or from the wells of other lessees under this Act, or the transportation of coal or to increase the acreage which

may be acquired or held under section 17 of this Act: *Provided*, That any combination for such purpose or purposes shall be subject to the approval of the Secretary of the Interior on application to him for permission to form the same. Except as in this Act provided, if any of the lands or deposits leased under the provisions of this Act shall be subleased, trusteeed, possessed, or controlled by any device permanently, temporarily, directly, indirectly, tacitly, or in any manner whatsoever, so that they form a part of or are in anywise controlled by any combination in the form of an unlawful trust, with the consent of the lessee, or form the subject of any contract or conspiracy in restraint of trade in the mining or selling of coal, phosphate, oil, oil shale, gas, or sodium entered into by the lessee, or any agreement or understanding, written, verbal, or otherwise, to which such lessee shall be a party, of which his or its output is to be or become the subject, to control the price or prices thereof or of any holding of such lands by any individual, partnership, association, corporation, or control in excess of the amounts of lands provided in this Act, the lease thereof shall be forfeited by appropriate court proceedings. (30 U.S.C. 184.)

Sec. 28. Rights-of-way through the public lands, including the forest reserves of the United States, may be granted by the Secretary of the Interior for pipe-line purposes for the transportation of oil or natural gas to any applicant possessing the qualifications provided in section 1 of this title, to the extent of the ground occupied by the said pipe line and twenty-five feet on each side of the same under such regulations and conditions as to survey, location, application, and use as may be prescribed by the Secretary of the Interior and upon the express condition

that such pipe lines shall be constructed, operated, and maintained as common carriers and shall accept, convey, transport, or purchase without discrimination, oil or natural gas produced from Government lands in the vicinity of the pipe line in such proportionate amounts as the Secretary of the Interior may, after a full hearing with due notice thereof to the interested parties and a proper finding of facts, determine to be reasonable: *Provided*, That the Government shall in express terms reserve and shall provide in every lease of oil lands under this Act that the lessee, assignee, or beneficiary, if owner, or operator or owner of a controlling interest in any pipe line or of any company operating the same which may be operated accessible to the oil derived from lands under such lease, shall at reasonable rates and without discrimination accept and convey the oil of the Government or of any citizen or company not the owner of any pipe line, operating a lease or purchasing gas or oil under the provisions of this Act: *Provided further*, That no right-of-way shall hereafter be granted over said lands for the transportation of oil or natural gas except under and subject to the provisions, limitations, and conditions of this section. Failure to comply with the provisions of this section or the regulations and conditions prescribed by the Secretary of the Interior shall be ground for forfeiture of the grant by the United States district court for the district in which the property, or some part thereof, is located in an appropriate proceeding. (30 U.S.C. 185.)

Sec. 30. That no lease issued under the authority of this Act shall be assigned or sublet, except with the consent of the Secretary of the Interior. The lessee may, in the discretion of the Secretary of the Interior, be permitted

at any time to make written relinquishment of all rights under such a lease, and upon acceptance thereof be thereby relieved of all future obligations under said lease, and may with like consent surrender any legal subdivision of the area included within the lease. Each lease shall contain provisions for the purpose of insuring the exercise of reasonable diligence, skill, and care in the operation of said property; a provision that such rules for the safety and welfare of the miners and for the prevention of undue waste as may be prescribed by said Secretary shall be observed, including a restriction of the workday to not exceeding eight hours in any one day for underground workers except in cases of emergency; provisions prohibiting the employment of any boy under the age of sixteen or the employment of any girl or woman, without regard to age, in any mine below the surface; provisions securing the workmen complete freedom of purchase; provision requiring the payment of wages at least twice a month in lawful money of the United States, and providing proper rules and regulations to insure the fair and just weighing or measurement of the coal mined by each miner, and such other provisions as he may deem necessary to insure the sale of the production of such leased lands to the United States and to the public at reasonable prices, for the protection of the interests of the United States, for the prevention of monopoly, and for the safeguarding of the public welfare; Provided, That none of such provisions shall be in conflict with the laws of the State in which the leased property is situated. (30 U.S.C. 187.)

Sec. 30. (a) Notwithstanding anything to the contrary in section 30 hereof, any oil or gas lease issued under the authority of this Act may be assigned or subleased, as

to all or part of the acreage included therein, subject to final approval by the Secretary and as to either a divided or undivided interest therein, to any person or persons qualified to own a lease under this Act, and any assignment or sublease shall take effect as of the first day of the lease month following the date of filing in the proper land office of three original executed counterparts thereof, together with any required bond and proof of the qualification under this Act of the assignee or sublessee to take or hold such lease or interest therein. Until such approval, however, the assignor or sublessor and his surety shall continue to be responsible for the performance of any and all obligations as if no assignment or sublease had been executed. The Secretary shall disapprove the assignment or sublease only for lack of qualification of the assignee or sublessee or for lack of sufficient bond: *Provided, however,* That the Secretary may, in his discretion, disapprove an assignment of a separate zone or deposit under any lease, or of a part of a legal subdivision. Upon approval of any assignment or sublease, the assignee or sublessee shall be bound by the terms of the lease to the same extent as if such assignee or sublessee were the original lessee, any conditions in the assignment or sublease to the contrary notwithstanding. Any partial assignment of any lease shall segregate the assigned and retained portions thereof, and as above provided, release and discharge the assignor from all obligations thereafter accruing with respect to the assigned lands; and such segregated leases shall continue in full force and effect for the primary terms of the original lease, but for not less than two years after the date of discovery of oil or gas in paying quantities upon any other segregated portion of the lands originally subject to such lease. Assignments under this section may also be made

of parts of leases which are in their extended term because of production, and the segregated lease of any undeveloped lands shall continue in full force and effect for two years and so long thereafter as oil or gas is produced in paying quantities. (30 U.S.C. 187a.)

Sec. 32. That the Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this Act, also to fix and determine the boundary line of any structure, or oil or gas field, for the purposes of this Act: Provided, That nothing in this Act shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States. (30 U.S.C. 189.)

2. Mining Law:

(30 U.S.C. 26, 28; R.S. 2322, 2326)

§ 26. Locators' rights of possession and enjoyment

The locators of all mining locations made on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim existed on the 10th day of May 1872 so long as they comply with the laws of the United States, and with State, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their

entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. Nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another. R.S. § 2322.

- § 28. Mining district regulations by miners; annual labor on claims pending issue of patent; expenditure on tunnels considered

The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims made after May 10, 1872, shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the

10th day of May 1872, and until a patent has been issued therefor, not less than \$100 worth of labor shall be performed or improvements made during each year. On all claims located prior to the 10th day of May 1872, \$10 worth of labor shall be performed or improvements made each year, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. Upon the failure of any one of several coowners to contribute his proportion of the expenditures required hereby, the coowners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners who have made the required expenditures. The period within which the work required to be done annually on all unpatented mineral claims located since May 10, 1872, including such claims in the Territory of Alaska, shall commence at 12 o'clock meridian on the 1st day of July succeeding the date of location of such claim.

Where a person or company has or may run a tunnel for the purposes of developing a lode or lodes, owned by said person or company, the money so expended in said tunnel shall be taken and considered as expended on said lode or lodes, whether located prior to or since May 10, 1872; and such person or company shall not be required to perform work on the surface of said lode or lodes in order to hold the same as required by this section. On all such valid claims the annual period ending December 31, 1921, shall continue to 12 o'clock meridian July 1, 1922. R.S. § 2324; Feb. 11, 1875, c. 41, 18 Stat. 315; Jan. 22, 1880, c. 9, § 2, 21 Stat. 61; Aug. 24, 1921, c. 84, 42 Stat. 186.

INDEX

Statement.....	Page 1
Discussion.....	7

CITATIONS

Cases:

<i>Bank of America v. Parnell</i> , 352 U.S. 29.....	8, 14
<i>Boesche v. Udall</i> , 373 U.S. 472.....	8, 9, 12
<i>Clearfield Trust Co. v. United States</i> , 318 U.S. 363.....	8
<i>Free v. Bland</i> , 369 U.S. 663.....	8, 14, 15
<i>Irvine v. Marshall</i> , 20 How. 558.....	8
<i>Leiter Minerals, Inc. v. United States</i> , 329 F. 2d 85, vacated as moot, 381 U.S. 413.....	15
<i>McCulloch Oil Corporation of California</i> , Department of Interior Decision No. A-30208 (November 25, 1964).....	12
<i>Morgan v. Udall</i> , 306 F. 2d 799.....	4
<i>State Box Co. v. United States</i> , 321 F. 2d 640.....	15
<i>Sola Electric Co. v. Jefferson Co.</i> , 317 U.S. 173.....	8
<i>United States v. 93,970 Acres</i> , 360 U.S. 328.....	15

Statutes and regulations:

Mineral Leasing Act of 1920, 41 Stat. 437, as amended, 30 U.S.C. 181 <i>et seq.</i>	2
Sec. 1, 30 U.S.C. 181.....	9
Sec. 17(a), 30 U.S.C. 326(a).....	9
Sec. 17(c), 30 U.S.C. 226(c).....	9
Sec. 27, as amended, 30 U.S.C. 184.....	12
Sec. 30, 30 U.S.C. 187.....	9
Sec. 30a, 30 U.S.C. 187(a).....	9
Sec. 31, 30 U.S.C. 188.....	10
Sec. 32, 30 U.S.C. 189.....	10
Mineral Leasing Act for Acquired Lands, 61 Stat. 913, 30 U.S.C. 351 <i>et seq.</i>	2

43 Code of Federal Regulations:

§§ 3100, 3123, 3128, 3210, 3211, 3212.....	2, 3, 15
--	----------

Miscellaneous:

H. Rep. No. 1138, 65th Cong., 3d Sess., p. 19.....	9
H. Rep. 398, 66th Cong., 1st Sess., pp. 12-13.....	9
Note, 77 Harv. L. Rev. 1084 (1964).....	8

THE BIBLE

THE BIBLE IS THE WORD OF GOD

AND THE FOUNDATION OF OUR FAITH

AND THE SOURCE OF OUR SALVATION

AND THE LIGHT OF OUR LIVES

AND THE POWER OF OUR PRAYERS

AND THE KEY OF OUR KNOWLEDGE

AND THE WAY OF OUR WISDOM

AND THE GROUND OF OUR GRACE

AND THE FOUNTAIN OF OUR FORTITUDE

AND THE ROCK OF OUR REFUGE

AND THE SHIELD OF OUR SHIELD

AND THE SWORD OF OUR SPIRIT

AND THE HELM OF OUR HOPE

AND THE CROWN OF OUR GLORY

AND THE THRONE OF OUR TRUTH

AND THE PALACE OF OUR PEACE

AND THE TEMPLE OF OUR TENDRENESS

AND THE GARDEN OF OUR GRACE

AND THE HOUSE OF OUR HOLINESS

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 341

FLOYD A. WALLIS, PETITIONER

v.

PAN AMERICAN PETROLEUM CORPORATION ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to the Court's order of October 11, 1965, inviting the Solicitor General to express the views of the United States.

STATEMENT

1. It may help in understanding the nature of the dispute which gave rise to this litigation to explain at the outset why different applications must be filed for an oil and gas lease on federal lands depending on whether the land in question is "acquired" or "public domain" land, and the significance of the distinction. Acquired lands, in general, are those granted

or sold to the United States by States or citizens thereof; public domain lands of the United States are those that were never in private or (with some exceptions) State ownership. Mineral leases on public domain lands are governed by the Mineral Leasing Act of 1920, 41 Stat. 437, 30 U.S.C. 181 *et seq.* Congress, however, made no provision for mineral leases on acquired lands until 1947, when it enacted the Mineral Leasing Act for Acquired Lands, 61 Stat. 913-915, 30 U.S.C. 351-359.

In general, the later Act incorporates the provisions of the earlier. See 30 U.S.C. 189; 43 C.F.R. 3210.0-3(a), 3211.3. However, there are some significant substantive differences between the two Acts. For example, receipts derived by the United States from the leases are treated differently. Compare 30 U.S.C. 191 with 30 U.S.C. 355. Leases of acquired lands, but not of public domain lands, require the consent of the federal agency having jurisdiction of the lands,¹ and that agency may impose conditions in the lease. 30 U.S.C. 352. In addition, leases on acquired but not public domain lands may cover future as well as present interests. 30 U.S.C. 354. As a result of these and other differences between acquired and public domain lands, different information is required on the lease applications. Compare 43 C.F.R. 3123 with 43 C.F.R. 3212. And, all concede (see R. 68, n. 10), an application filed under the wrong statute will not be accepted by the Secretary and confers no

¹ Public domain lands are under the exclusive jurisdiction of the Department of the Interior; acquired lands are under that Department's jurisdiction only for limited purposes such as mineral development.

rights upon the applicant. See 43 C.F.R. 3123.4, 3212.4(d), 3212.1(b). Hence, an applicant who is unsure whether the land on which he is seeking an oil and gas lease is acquired or public domain land must file a separate application under each mineral leasing law.² The nub of the dispute giving rise to the present case is whether, in contracting with express reference only to applications filed under the acquired lands Act, the parties meant to cover a later-filed successful public-domain-lands application on the same tract.

2. Petitioner, Floyd Wallis, found an 830-acre tract of oil-rich "mud lumps"³ located in the State of Louisiana, but belonging to the United States (R. 65). On June 2, 1954, he filed with the Secretary of the Interior applications for a lease to develop the oil and gas deposits of the tract. Assuming that the mud lumps were acquired lands (R. 67 and n. 6), Wallis applied only under the Mineral Leasing Act for Acquired Lands (R. 66).

On January 3, 1955, he and respondent McKenna agreed in writing that the latter had "a $\frac{1}{3}$ undivided interest in the above captioned oil and gas lease applications and that [his] $\frac{1}{3}$ interest, of course, covers such lease or leases as may be issued to [Wallis] under these captioned applications" (R. 9, 67). Apparently, the consideration for this grant to McKenna was the latter's representation of Wallis before the Depart-

² Such double filing is permissible. Petitioner did it here (see pp. 3-4, *infra*).

³ The mud lumps are a string of recently-emerged islands in the mouth of the Mississippi River.

ment of the Interior (Brief for Petitioner, p. 8). The "captioned applications" referred to in the agreement were the acquired-lands applications Wallis had filed on June 2, 1954 (R. 8).

On March 3, 1955, Wallis (who under the agreement with McKenna had "sole discretion and direction" (R. 9, 67, n. 5) with respect to dealing in connection with the leases) sold respondent Pan American an option "to acquire any and all oil and gas leases which may be issued to Wallis, his heirs or assigns, under and by virtue of the above referred to applications." (R. 42, 67.) The reference was to Wallis' "applications for * * * oil and gas leases on acquired lands" which he had filed with the Secretary of the Interior on June 2, 1954 (R. 40). The option agreement also contained a provision that Wallis would "make diligent efforts to acquire leases * * * covering all of said lands" (R. 42).

About a year later, Wallis decided that the mud lumps might not be acquired lands after all, and, without entering into any new agreements with respondents, filed an application for an oil and gas lease of the mud lumps as public domain lands under the Mineral Leasing Act of 1920 (R. 68-69). Wallis' new application was approved and a lease issued to him by the Secretary on December 19, 1958 (R. 78). The award of the lease to Wallis was upheld against the claim of another applicant in *Morgan v. Udall*, 306 F. 2d 799 (C.A. D.C.), certiorari denied, 371 U.S. 941.

Shortly after the Secretary issued the lease to Wallis, McKenna commenced the present action in the Federal District Court for the Eastern District

of Louisiana, predicated federal jurisdiction on diversity of citizenship (R. 1). McKenna alleged that he had been Wallis' joint venturer (R. 2), that he was entitled to a $\frac{1}{3}$ interest in the public-domain-lands lease issued to Wallis (R. 6), and that Wallis had refused to assign him his interest. Declaratory relief was asked (R. 7). Pan American filed a complaint in the same court against Wallis, also based on the court's diversity jurisdiction (R. 32), alleging that the option agreement covered the lease of public domain lands (R. 33) and that in any event Wallis was estopped to claim otherwise in view of the provision of the option agreement requiring him to make diligent efforts to acquire a lease of the mud lumps (R. 37). The complaint asked that Wallis be ordered to perform the option agreement by formally assigning the oil and gas lease to Pan American (R. 39).

The actions were tried together. At the close of trial, the district court, Judge Wright, gave judgment for petitioner. 200 F. Supp. 468 (E.D. La.) (R. 65). He held that the question whether respondents had acquired interests in the lease obtained by petitioner was governed by the law of Louisiana (R. 70), and, accordingly, that the only basis for the relief sought by respondents could be the two written instruments—the letter agreement with McKenna made on January 3, 1955, and the option agreement with Pan-American of March 3, 1955 (R. 69-70). Under Louisiana law, not only was parol evidence inadmissible but Pan-American could not obtain an interest in a mineral lease by estoppel; hence, even if Wallis had breached the "diligent efforts" clause, Pan American could not

obtain, by way of remedy, specific performance of the option agreement (R. 70-71, nn. 15-16). Construing the written instruments, Judge Wright found that they spoke exclusively of acquired-lands leases (R. 71), and that, since the Mineral Leasing Act for Acquired Lands and the Mineral Leasing Act of 1920 established separate and distinct application procedures for acquired and public domain lands (see pp. 1-3, *supra*), a public-domain-lands application could not be viewed "as a mere amendment of, or substitute for," an acquired-lands application (R. 73-74 and nn. 20-22). He further noted that the parol evidence in the case (which he had in fact admitted, albeit he deemed it inadmissible (R. 71 and n. 17)) confirmed his finding that the parties' agreements were strictly limited to the acquired-lands applications and did not carry over to the public-domain-lands application granted by the Secretary (R. 69-73).

The Court of Appeals for the Fifth Circuit, one judge dissenting, reversed. 344 F. 2d 432 (R. 78); on rehearing, 344 F. 2d 439 (R. 107). Without indicating any view of the merits (R. 114), the court held that in light of the "comprehensive scheme of federal regulation" embodied in the Mineral Leasing Act, the "interest of the United States [was] directly affected" by the controversy between the parties so as to make federal rather than State law applicable to determining the merits of respondents' claims (R. 113). Judge Wisdom, dissenting, stated that he could "find no decisional or doctrinal justification for applying judge-made federal common law to a private dog-fight

in which the federal government's interest, if any, seems to me to be that of a bored spectator." (R. 133.)

DISCUSSION

1. The issue here, in essence, is whether State or federal law governs the adjudication of a dispute among three private individuals over their respective interests in an oil and gas lease issued by the United States under the Mineral Leasing Act of 1920. More concretely, it is whether Louisiana's apparent refusal to recognize estoppel as a basis for obtaining an interest in a mineral lease bars Pan American's claim—for Judge Wright's findings of fact (unless the court of appeals were to find them clearly erroneous⁴) would appear to exclude the relief sought by respondents on any other theory irrespective of what law was applied.⁵ We note, further, that respondents' claims against Wallis are not based upon any alleged violation by Wallis of a federal statute, regulation, or order, that the validity of the lease by the United

⁴ Since it reversed Judge Wright on the sole ground that he had applied the wrong law, the court of appeals did not consider the correctness of the findings of fact contained in Judge Wright's opinion (he did not issue separate findings). Their correctness, accordingly, is not an issue before this Court in this case.

⁵ Judge Wright, as mentioned earlier, considered all the evidence of the parties' conduct and intentions, despite his view that Louisiana law rendered such evidence inadmissible to determine interests in Wallis' oil and gas lease. Yet he found that there was no agreement between Wallis and respondents applicable to that lease. This, it seems, leaves only Pan American's estoppel claim, based on the "diligent efforts" clause of the option agreement, as a basis of relief consistent with the court's findings.

States issued to Wallis is not here in issue,⁶ and that the United States was not a party to the transaction in suit (compare *Clearfield Trust Co. v. United States*, 318 U.S. 363). In these circumstances, we believe that the rights of the litigants may properly be left to determination under principles of State law unless the application of such principles would undermine some federal interest or policy—here, one drawn from the Mineral Leasing Act of 1920. See *Free v. Bland*, 369 U.S. 663; *Bank of America v. Parnell*, 352 U.S. 29; *Sola Electric Co. v. Jefferson Co.*, 317 U.S. 173; Note, *The Competence of Federal Courts to Formulate Rules of Decision*, 77 Harv. L. Rev. 1084 (1964). We doubt there is any substantial danger of such conflict here.

2. It is true, as the court of appeals noted, that the Mineral Leasing Act of 1920 subjects the exploitation by private individuals of the oil and gas deposits found on public domain lands of the United States to comprehensive federal regulation. Reviewing its legislative history in *Boesche v. Udall*, 373 U.S. 472, 480-481, this Court pointed out that the Act was born of concern with the depletion of the nation's oil resources through inadequate legal control. The solution adopted by Congress was to give the Secretary of the Interior "the right to supervise, control, and

⁶ This distinguishes *Irvine v. Marshall*, 20 How. 558, strongly relied on by the court of appeals in its first opinion (R. 80-82). There this Court held only that State law could not control the question whether the United States had made a grant of land. Once that question was resolved under federal law, however, the Court indicated that State law was applicable to the determination of private disputes over interests in the grant. 20 How. at 567.

regulate" the private exploitation of such resources on public domain lands to the end of fostering conservation and preventing "monopoly and waste and other lax methods * * *." H. Rep. No. 1138, 65th Cong., 3d Sess., p. 19; see H. Rep. No. 398, 66th Cong., 1st Sess., pp. 12-13.

The provisions of the Act reflect this dominant theme. Section 17(a), 30 U.S.C. 226(a), authorizes the Secretary of the Interior to lease lands known or believed to contain oil or gas deposits. There is no provision for the sale of such lands; the United States reserves the fee interest to facilitate continuing supervision and control by the Secretary. *Bresche v. Udall*, *supra*, at 477-478. Leases on lands (such as the Wallis mud lumps) which are not within any known geologic structure of a producing oil or gas field are awarded to the first applicant—if he is qualified. Section 17(c), 30 U.S.C. 226(c). Qualifications are prescribed in Section 27 of the Act, 30 U.S.C. 184, which limits the amount of acreage that any one person or firm can hold under oil or gas leases or options, and in Section 1, 30 U.S.C. 181, which forbids certain aliens to hold under such leases.

Any assignment or sublease of a lease issued under the Act must be approved by the Secretary of the Interior (Section 30, 30 U.S.C. 187), but he may disapprove only if the assignee or sublessee is disqualified under the Act or has failed to post the required bond. Section 30a, 30 U.S.C. 187a.⁷ The lease must contain provisions prescribed in the Act for ensuring

⁷ These provisions are expressly applicable to partial assignments as well.

the skill and safety of the operations under the lease and for other specified purposes, and in addition the Secretary may require "such other provisions as he may deem necessary * * * for the protection of the interests of the United States, for the prevention of monopoly, and for the safeguarding of the public welfare." Section 30, 30 U.S.C. 187. There are detailed provisions in the Act for the surrender, forfeiture, and cancellation of leases (see, *e.g.*, Section 31, 30 U.S.C. 188; 30 U.S.C. 188a) and numerous provisions vesting the Secretary with control and supervision over various aspects of the actual operations under the lease. See, *e.g.*, Section 17(j), 30 U.S.C. 226(j). Finally, the Secretary is given comprehensive rule-making authority to implement the statutory provisions. Section 32, 30 U.S.C. 189. Such, in brief summary, is the scheme of the Act.

3. We find nothing in this scheme inconsistent with allowing State law to govern the rights *inter se* of co-venturers in a valid oil and gas lease duly issued to one of them by the Secretary of the Interior. Certainly, there is no danger of undermining the Secretary's regulatory authority under the Act. The Secretary's interest is that the oil and gas deposits found on public domain lands be exploited only by qualified persons in conformity with the proper lease provisions. This interest cannot be adversely affected by the present litigation. All concede that Wallis is a qualified applicant holding a valid lease. Thus, if he prevails in the suit, the status quo—so far as the Secretary is concerned—is unaffected. If, on the other hand, McKenna and/or Pan American pre-

vail and Wallis is ordered to assign the lease in whole or part to one or both of them, they nevertheless will obtain no rights in the oil and gas deposits unless the assignment is approved by the Secretary. He cannot approve it unless the assignee is qualified. And if the assignment is approved, Section 30a expressly provides that the assignee shall assume all of the obligations imposed by the lease on the original lessee. Assignment pursuant to a private agreement, therefore, cannot impair the Secretary's authority over the mineral exploitation of public lands. Since the outcome of the present case is thus of no concern from the Secretary's standpoint, neither is the law applied in such litigation.

We emphasize that the Secretary has not been empowered by Congress to compel assignments or to determine the rights of Wallis, McKenna, and Pan American *inter se*. The Act contains no provisions governing the private business relations of parties to oil and gas ventures and does not purport to impose on oil and gas entrepreneurs a duty to deal fairly with their partners or associates: * a lease must be issued to the first qualified applicant and an assignment to a qualified applicant who posts the required bond must be approved. Nor does it appear that Wallis' alleged misconduct would be a basis for cancellation of his lease. The only grounds for cancellation specified in the Act involve the violation of statu-

* Section 18 of the Act, 30 U.S.C. 227, does deny the benefits of that section (the provisions of which are not pertinent here) to a lease claimant guilty of fraud, but there is no similar provision applicable to the Act in general.

tory provisions, the Secretary's regulations thereunder, or lease provisions. Sections 16, 27, 31; 30 U.S.C. 225, 184, 188.*

The short of it is that the Secretary's power over private agreements with respect to interests in oil or gas leases is directed at preventing control of such leases from falling into the hands of disqualified persons,¹⁰ and we do not see how such power can be impaired by the use of State law to determine the rights created by such private agreements. This has been the consistent view of the Secretary, summarized in a recent Department of Interior decision in *McCulloch Oil Corporation of California*, No. A-30208 (November 25, 1964), as follows:

* To be sure, *Boesche v. Udall*, 373 U.S. 472, held that the Secretary had, in addition, inherent authority to cancel a lease issued by mistake. But this authority was obviously necessary to vindicate the statutory limitations upon the issuance of oil and gas leases. There is no such limitation with respect to the issuance of a lease to a person who may have dealt unfairly with or misled, not the Secretary, but only his co-venturers. Further, any unfairness by Wallis here occurred after he obtained the lease, when he refused to assign interests therein to McKenna or Pan American. The Court in the *Boesche* case intimated that the statutory provisions for cancellation might be exclusive with respect to post-lease factors. See 373 U.S. at 478-479.

¹⁰ This is true of options as well as assignments. The Act requires the filing with the Secretary of notices of options, and he must approve options that run for more than three years. Section 27(d)(2), 30 U.S.C. 184(d)(2). These requirements, however, are solely directed toward preventing evasion of the acreage limitations imposed by the Act (see p. 9, *supra*). The validity of an option as between the parties to it is entirely separate from its validity under Section 27(d)(2), and the Act says nothing about the former question.

The Department has consistently held that it will not act on an assignment of an oil and gas lease submitted for approval when it has notice of a controversy between the parties as to the effect or validity of the assignment. [Citations.] In cases where an assignment has been approved without notice of a controversy as to its effect or validity and the Department subsequently receives notice of a controversy, it has declined to disturb existing conditions or to approve any change without evidence of an agreement among the parties or a court decree on the matter in controversy. [Citations.]

* * * * *

The central fact remains that there is a controversy between McCulloch and Chittim as to whether Chittim is entitled to an assignment. McCulloch does not question the validity of the assignment when it was executed by Cuban American on April 1, 1965. McCulloch apparently contends only that the assignment became invalid for reasons occurring after execution of the assignment. What these reasons are and whether they are valid seem to involve questions of contract law and possibly State corporation law. In any event, they are not matters within the jurisdiction of the Department to decide.

4. It is arguable that even if, as we say, the Secretary's authority would not be undermined by the application of State law in cases of this sort, the promotion of fair dealing between co-venturers is vital to the broader objectives of the Mineral Leasing Act—the conservation of an essential natural resource, the promotion of efficiency, and the prevention of monop-

oly—and, therefore, federal law should govern the business relations *inter se* of oil and gas co-venturers, as well as their relations with the Secretary. There are, however, two complete answers to this contention. The first is that the possible impact on federal interests of disputes such as that between petitioner and respondents is simply “too speculative” to justify fashioning a federal common law of oil and gas agreements. *Free v. Bland*, 369 U.S. 663, 669; *Bank of America v. Parnell*, 352 U.S. 29, 34. It is possible that under a uniform federal rule Pan American would be entitled to prove, if it could, that it obtained rights to Wallis’ lease by estoppel; but it is not suggested how the objectives of the federal Act would be materially furthered by such an outcome.

The second (and related) answer is that there is no indication that State law is inadequate to prevent fraud, unfairness, bad faith, or breach of contract between oil and gas entrepreneurs and that a federal rule is therefore needed. As the facts of the present case illustrate, the issues involved in such disputes are the kind normally resolved as questions of private law. They are local rather than federal in character. They involve the determination of rights of private litigants *inter se*—not their rights against the government—and this is precisely the province of State law.¹¹

5. We wish to emphasize our belief that, while there may be no harm to the objectives of the federal min-

¹¹ As Judge Wisdom showed (R. 116-117, n. 5), it does not appear that the law of Louisiana is in general inadequate to resolve disputes between co-venturers in oil and gas matters fairly and equitably.

eral leasing laws in leaving to the governance of State law purely private agreements to divide interests in oil and gas leases, federal law should control questions affecting the rights or interests of the United States in its lands. The critical distinction, in our view, is between a controversy over rights in a mineral lease as between private parties, such as the litigants here, and a controversy over rights of a private applicant, lessee, or assignee as against the United States. The first kind of dispute is anterior, as it were, to any federal concern; it does "not intrude upon the rights and the duties of the United States" (*Free v. Bland*, 369 U.S. 663, 669); and it may therefore be left to the ordinary State-law rules for the adjudication of private controversies. Once that dispute is resolved, the federal interest comes into play. For the party who succeeds in establishing his interest in an oil and gas lease on federal lands must then comply with the statutory requirements governing the assignment of leases and the obligations of assignees. The rights and duties of the assignee vis-à-vis the Secretary are governed by federal, not State, law. Cf. *United States v. 93,970 Acres*, 360 U.S. 328; *State Box Co. v. United States*, 321 F. 2d 640 (C.A. 9); but cf. *Leiter Minerals, Inc. v. United States*, 329 F. 2d 85 (C.A. 5), vacated as moot, 381 U.S. 413.

An example will illustrate the distinction. The Secretary has issued a regulation requiring disclosure of the names of all parties who have any "interest" in an assignment (43 C.F.R. 3128.1), interest being defined broadly (43 C.F.R. 3100.0-5(a)). The pur-

pose, of course, is to ensure that the lease does not fall into the hands of a disqualified person (see p. 9, *supra*). The regulation goes on to provide that any agreement with respect to an interest in the assignment must be disclosed, even an oral agreement. It is our view that under this regulation an assignee may not conceal the existence of an oral agreement respecting an interest in the assignment on the ground that such an agreement is unenforceable by virtue of Louisiana's parole evidence rule. Information needed by the Secretary to enable him to enforce the provisions of the Mineral Leasing Act cannot be withheld on the strength of a State rule of evidence. Here, however, Louisiana law is being applied to determine, not rights against the Secretary, but only rights as between private parties. In these circumstances, no federal interest appears to be impaired by deferring to State law.

Respectfully submitted.

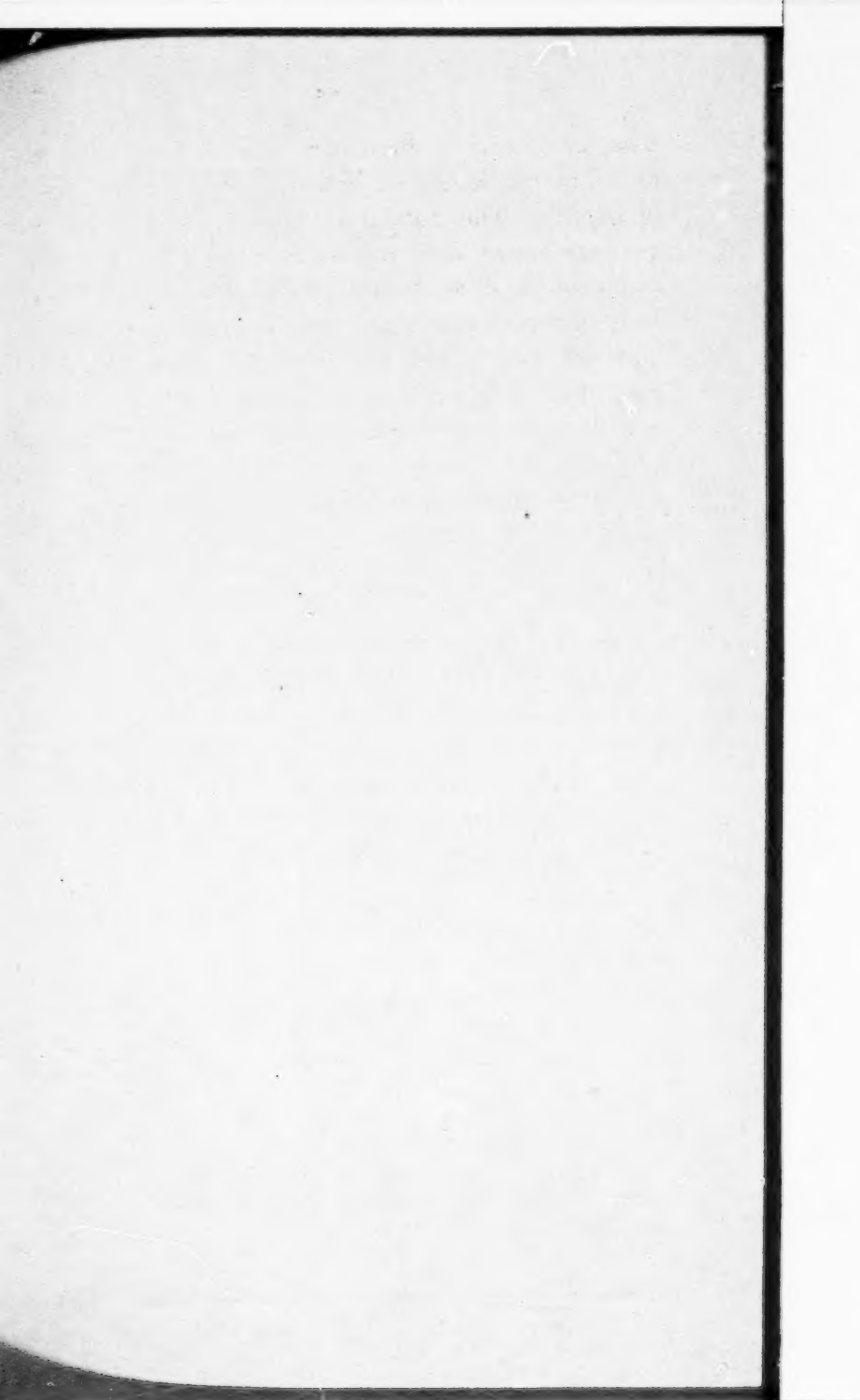
THURGOOD MARSHALL,
Solicitor General.

EDWIN L. WEISL, Jr.,
Assistant Attorney General.

RICHARD A. POSNER,
Assistant to the Solicitor General.

ROGER P. MARQUIS,
Attorney.

DECEMBER 1965.



INDEX

	Page
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	4
A. FEDERAL LAW SHOULD APPLY BECAUSE:	5
1. Stare Decisis and the "Rule of Property" Demand It	5
2. Uniformity Demands It	14
3. The Choice of Law Demands It	21
4. Justice Demands It	21
5. Naught to the Contrary Exists in Erie	22
B. IF THIS COURT HOLDS THAT THE LAW OF LOUISIANA DOES CONTROL, THE CASE SHOULD BE REMANDED FOR A DETERMINATION THAT THE WRITINGS IN THE RECORD MEET THE REQUIREMENTS OF SUCH STATE LAW	23
CONCLUSION	25

CITATIONS

CASES:

<i>Amerada Petroleum Corporation v. Reese et al.</i> , 195 La. 359, 196 So. 558 (1940)	17
<i>Arnold et al. v. Sun Oil Co.</i> , 218 La. 50, 48 So.2d 369 (1949)	17
<i>Bagnell et al. v. Broderick</i> , 38 U.S. (13 Peters) 436 (1839)	7, 13
<i>Boesche v. Udall</i> , 373 U.S. 472 (1962)	10, 13, 20
<i>Bomar v. Keyes et al.</i> , 162 F.2d 136 (2d Cir. 1947)	18
<i>Coyle et al. v. North American Oil Consolidated et al.</i> , 201 La. 99, 9 So.2d 473 (1942)	17
<i>DeSylva v. Ballentine</i> , 351 U.S. 570 (1956)	18
<i>Dyke v. Dyke</i> , 277 F.2d 461 (6th Cir. 1955)	18

	Page
<i>Erie R.R. v. Tomkins</i> , 304 U.S. 64 (1938)	22, 23
<i>Francis et al. v. Southern Pacific Co.</i> , 333 U.S. 437 (1948)	18
<i>Gibson v. Chouteau</i> , 80 U.S. (13 Wall.) 92 (1871)	6, 13
<i>Gulf Refining Co. of Louisiana v. Glassell</i> , 186 La. 190, 170 So. 846 (1936)	16
<i>Hayes et al. v. Muller</i> , 245 La. 356, 158 So.2d 191 (1963) ..	17
<i>Holmberg v. Armbrecht</i> , 327 U.S. 392 (1946)	17
<i>Irvine v. Marshall and Barton</i> , 61 U.S. (20 How.) 558 (1856)	6, 7, 10, 13, 22
<i>Johnston et ux. v. Goggin et al.</i> , 323 F.2d 36 (5th Cir. 1963)	21
<i>Kittridge v. Breaud</i> , 39 Am. Dec. 512 (La. 1843) ..	9, 10, 21
<i>Kossick v. United Fruit Co.</i> , 365 U.S. 731 (1961)	19
<i>Lawrence v. Sun Oil Co. et al.</i> , 166 F.2d 466 (5th Cir. 1948)	16
<i>Levinson et al. v. Deupree</i> , 345 U.S. 648 (1953)	18
<i>Libbey v. L. J. Corporation</i> , 101 U.S. App. D.C. 81, 247 F.2d 78 (1957)	21
<i>Massie v. Watts</i> , 10 U.S. (6 Cranch) 148 (1810)	6, 10
<i>McKenna v. Seaton et al.</i> , 104 U.S. App. D.C. 50, 259 F.2d 780 (1958)	3
<i>Minnesota Company v. National Company</i> , 70 U.S. (3 Wall.) 332 (1865)	14
<i>O'Brien v. Western Union Telegraph Co.</i> , 113 F.2d 539 (1st Cir. 1940)	18
<i>Perkins v. Long-Bell Petroleum Company, Inc.</i> , 227 La. 1044, 81 So.2d 389 (1955)	16
<i>Reagan v. Murphy et al.</i> , 235 La. 529, 105 So.2d 210 (1958)	16
<i>Sola Electric Co. v. Jefferson Electric Co.</i> , 317 U.S. 173 (1942)	17
<i>U. S. v. Tile Ins. & Trust Co. et al.</i> , 265 U.S. 472 (1923) ..	14
<i>Van Dusen v. Barrack</i> , 376 U.S. 612 (1963)	23
<i>Wilcox v. Jackson</i> , 38 U.S. (13 Peters) 498 (1839) ..	6, 13

STATUTES:

Mineral Leasing Act of 1920, 41 Stat. 437, as amended, 30 U.S.C.A. 181 <i>et seq.</i>	2, 11, 20, 24
Mineral Leasing Act for Acquired Lands, 61 Stat. 913, 30 U.S.C.A. 351 <i>et seq.</i>	2, 20, 24

Index Continued

iii

Page

MISCELLANEOUS:

18 A.L.R. 484 (1922)	21
95 A.L.R. 1242 (1935)	21
Department of the Interior Release No. 3289 (March 27, 1962)	15
II Report of the Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within the States (1957)	13
I Rocky Mountain Mineral Law Institute 45 (1955) ..	14

IN THE
Supreme Court of the United States

OCTOBER TERM, 1965

No. 341

FLOYD A. WALLIS, *Petitioner,*

v.

PAN AMERICAN PETROLEUM CORPORATION, *Respondent.*

FLOYD A. WALLIS, *Petitioner,*

v.

PATRICK A. McKENNA, *Respondent.*
(Pan American Petroleum Corporation, Initially a
Co-Defendant with Wallis)

On Writ of Certiorari to the United States Court of Appeals
For the Fifth Circuit

BRIEF FOR PATRICK A. McKENNA

STATEMENT OF THE CASE

In January 1954, McKenna, a resident of Washington, D. C., and Wallis, a resident of New Orleans, Louisiana, began their joint venture to obtain a federal oil and gas lease on certain lands situate in one of the passes of the

mouth of the Mississippi River. (R. 2) The lands at the time, and are today, owned by the federal government. (R.78)

As agreed between the parties, applications to lease were filed on June 2, 1954, by McKenna in the name of Wallis with the Department of the Interior in Washington, D. C., pursuant to the Mineral Leasing Act for Acquired Lands.¹ In his letter of December 27, 1954, Wallis confirmed in writing McKenna's one-third undivided interest in these applications and in any lease or leases which may have been issued thereunder. (R.2 & 8) The terms of the letter were approved by McKenna in the District of Columbia on January 3, 1955, and copies of the letter were filed of record in the same city with the Department's Bureau of Land Management on February 3, 1955. The Bureau was also advised by Wallis in writing of the written agreement with McKenna by which he was to receive the indicated interest in the leases on their issuance. (R. 2).

Counsel was retained in early 1955 to help prosecute the applications before the Department with each party agreeing to pay one-half of the legal fees. (R. 3). When counsel was no longer able to represent the parties, he was succeeded in late 1955 by another attorney to carry on the processing of the applications with each party again agreeing to pay one-half of the legal fees. Soon thereafter, the decision was made, with McKenna participating, to file another application, covering the same lands, for a federal oil and gas lease but this time pursuant to the Mineral Leasing Act of 1920.² (R. 3). A copy of the public domain

¹ Act of Aug. 7, 1947, c. 513, 61 Stat. 913, U.S.C.A. Title 30, Sections 351 *et seq.*

² Act of Feb. 25, 1920, c. 85, 41 Stat. 437, as amended, U.S.C.A., Title 30, Sections 181 *et seq.*

application³ was forwarded to McKenna on the day of its filing, March 8, 1956, who continued to pay his one-half share of the attorney's fees until he was advised by Wallis in late April 1956 that the latter no longer recognized the agreement between them. (R. 4).

Meanwhile, Wallis had negotiated an option agreement with Pan American on March 3, 1955, respecting the acquired lands applications and received as part of the consideration therefor a cash payment of \$8,300. McKenna was not advised of this agreement until following the issuance of the public domain lease in early 1959, Wallis having long before on March 29, 1955, denied that any such agreement had been reached with Pan American. (R. 5).

The public domain lease was issued to Wallis in December 1958, after an exhaustive opinion by the Department of Interior determining that the lands were not then and had never been within the State of Louisiana nor subject to its jurisprudence. When Wallis refused to honor his solemn agreements, suit was instituted in March 1959 before the United States District Court for the Eastern District of Louisiana. The trial court applied its view of the law of Louisiana and confined McKenna's interest to the acquired lands applications,⁴ although all applications related to

³ Public domain land is that in which title vested in the United States because of its sovereignty. Acquired land is that which was once privately owned and then acquired by the United States. An application for an oil and gas lease on public domain land is filed under the 1920 Act while such an application, if acquired land is involved, is filed under the 1947 Act. *McKenna v. Seaton et al.*, 104 U.S. App. D. C. 50, 259 F. 2d 780 (1958), *cert. denied* 358 U.S. 835.

⁴ As to these applications, the trial court said, "... In any case, as Wallis admits, the agreement was effective to transfer to McKenna an interest in the then pending applications and any lease issued thereunder." (R. 67).

the same lands and to a federal oil and gas lease on such lands.⁵ With one judge dissenting, the Court of Appeals reversed and remanded, holding that federal law should govern the case. (R. 78, 80).

SUMMARY OF ARGUMENT

Where equitable rights of private parties in lands owned by the United States originate prior to the issuance of the evidence of title, such equitable rights are enforceable in the courts and cannot be defeated by the interposition of local state law because:

A. Prior clear decisions of the United States Supreme Court have so held for over a hundred years, constitute a rule of property, and ought not be turned aside except for the most compelling of reasons, which reasons do not exist here;

B. The United States has a decided interest in the fullest utilization and exploitation of its mineral and oil and gas resources, has enacted sweeping statutes of regulation for oil and gas leases, and experience teaches that uniformity and stability in trade and commerce constitute not only a desirable but a most effective tool to consummate such utilization;

C. In this case, the court of final resort in the state involved has held that such equitable rights in such circumstances are to be enforced and not defeated;

D. Justice demands that our system of jurisprudence exert every effort to enforce the rights of all of its citizens, as opposed to aiding in the defeat of such rights predicated on commonly rejected and unusually restrictive local laws;

E. Assuming arguendo that a state can interpose its law, the thrust of Erie does not compel the application of such

⁵ In this connection, the trial court observed. "It may be true, as plaintiffs suggest, that the lease ultimately granted, pursuant to the public domain application, is, from the lessee's point of view, no different than one issued under an acquired lands offer. But that decides nothing . . ." (R. 73).

unusual and commonly rejected restrictive local laws to defeat the ends of justice where there exist no local interest to be protected, no state's rights to be enforced, the restrictive law is procedural only, and such would be at the expense of the destruction of a long-standing rule of property, would destroy the true purpose of uniformity, and would inevitably constitute a hazard to the unwary.

ARGUMENT

A. FEDERAL LAW SHOULD APPLY BECAUSE:

1. Stare Decisis and the "Rule of Property" demand it.
2. Uniformity demands it.
3. The "Choice of Law" demands it.
4. Justice demands it.
5. Naught to the contra exists in Erie.

1. Stare Decisis and the "Rule of Property" Demand it

In its opinion of June 7, 1956, (R. 83),⁶ the Department of the Interior examined the Louisiana Purchase from France with meticulous care, concluding therefrom that title became vested in the United States to all of the lands embraced in the Louisiana Purchase including the marginal sea. Subsequently, the State of Louisiana by specific descriptions was carved out of the Louisiana Purchase. In so carving out the State of Louisiana, the marginal sea was not conveyed to the Commonwealth of Louisiana, but title to such was retained by and in the United States. Thereafter, the lands involved in this suit arose out of the marginal sea in the form of mud lumps. Such newly formed lands, according to the Department of the Interior, were never within the physical confines of the State of Louisiana, and

⁶ The Fifth Circuit Court of Appeals quoted the opinion of the Bureau of Land Management at R. 83-86.

the jurisprudence of that state never attached. Based on these holdings, the Department of the Interior concluded the lands were part of the public domain as contrasted with after acquired lands.

Long ago the Court in *Wilcox v. Jackson*, 38 U.S. (13 Peters) 498, 516 (1839) stated the following as a fundamental proposition of law:

“We hold the true principle to be this, that whenever the question in any court, state or federal, is, whether a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States; but that whenever, according to those laws, the title shall have passed, then that property, like all other property in the state, is subject to the state legislation; so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States.”

In *Gibson v. Chouteau*, 80, U.S. (13 Wall.) 92, 99-100 (1871), the Court observed as follows:

“With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made. No State legislation can interfere with this right or embarrass its exercise . . .”

In the case of *Massie v. Watts*, 10 U.S. (6 Cranch) 148 (1810), one Massie, the agent of O’Neal, entered government lands for himself and obtained a patent in his own name. The agency had its inception in events prior to the issuance of the patent. Having thus obtained the legal title, Massie refused to convey to O’Neal. In decreeing the release sought by O’Neal in the United States District Court, the United States Supreme Court affirmed. In *Irvine v. Marshall and Barton*, 61 U.S. (20 How.) 558 (1856), the

Supreme Court analyzed its holding in *Massie* by quoting from that case and saying at pages 565 and 566:

“ ‘If Massie (i.e., the agent) really believed that the entry of O’Neal (his principal), as made, could not be surveyed, it was his duty to amend it, or to place it elsewhere. But if in this he was mistaken, it would be dangerous in the extreme—it would be a cover for fraud which could seldom be removed, if a locator alleging difficulties respecting a location might withdraw it, and take the land for himself. But Massie, the agent of O’Neal, has entered the land for himself, and obtained a patent in his own name. According to the *clearest and best-established principles of equity*, the agent who so acts becomes a *trustee* for his principal. He cannot hold the land under an entry for himself, otherwise *than as a trustee for his principal*.’ This exposition of the equity powers of the courts of the United States as applicable to resulting trusts—a power inseparable from the cognizance over frauds, one great province of equity jurisprudence—is conclusive.”

In *Bagnell et al. v. Broderick*, 38 U.S. (13 Peters) 436 (1839), the Supreme Court again made it clear that federal law was to apply to equitable rights created prior to the issuance of a patent.

Thereafter, the case of *Irvine v. Marshall and Barton*, *supra*, which closely parallels the case at bar, was considered by this Court. In that case, Irvine filed suit alleging that at a sale of public lands in the Minnesota territory, Marshall, as the agent and with the funds and under the authority of Irvine and Barton, purchased for them 160 acres of land and was issued a certificate of purchase. When suit was filed, Marshall was about to convey the entire acreage to Barton, having refused to convey to Irvine his undivided share. The effect of a territorial statute in force at the time was, as stated by the Court, “that in every instance of a grant or purchase, or of an agreement for the purchase of lands for a valuable consideration, in which the price or consideration shall be paid by one person, and the convey-

ance or the contract for title shall be to another, no use or trust shall result in favor of the person by whom such payment shall be made, but the title and possession shall vest exclusively in the person named as the alienee in such conveyance or agreement." (61 U.S. at 561). The judgment entered for Marshall and Barton was sustained on appeal but was reversed by this Court whose underlying premise was stated as follows at pages 561 and 562:

"... It cannot be denied that all the lands in the Territories, not appropriated by competent authority before they were acquired, are in the first instance the exclusive property of the United States, to be disposed of to such persons, at such times, and in such modes, and by such titles, as the Government may deem most advantageous to the public fisc, or in other respects most politic. This right has been uniformly reserved by solemn compacts upon the admission of new States, and has heretofore been recognized, and scrupulously respected by sovereign States within which large portions of the public lands have been comprised, and within which much of those lands is still remaining..."

The Court then asked at page 562:

"... Can this right co-exist with a power in a Territory (itself the property of the United States) to interpose and to dictate to the United States to whom, and in what mode, and by what title, the public lands shall be conveyed? If a person desirous of purchasing shall depute an agent to attend a sale of public lands, and if at such sale payment be made by the agent with the funds of his principal, and both agent and principal shall present themselves at the General Land Office, and mutually request a patent to be issued to the true owner, can it possibly be thought within the competency of a Territorial Legislature, either upon the suggestion, or upon proof of the fact, that a certificate of purchase was given to the agent in his own name, to interpose, and say to the Federal Government, *you shall not make a title to this person whom you know, upon the acknowledgment of all concerned, is the true and bona fide purchaser of the land, and, if you do we will vacate that title? ...*"

In refusing to apply the territorial statute to the case before it, the Court concluded at page 564 that:

“When the engagements or undertaking of the United States, with respect to property exclusively and confessedly their own, from a period anterior to the existence of the Territorial Government, shall have been consummated; when the subject and all control over it, shall have passed from the United States, and have become vested in a citizen or resident of the Territory, then indeed the Territorial regulations may operate upon it; but whilst these remain in the United States, or are affected by their rights, or powers, or duties, those rights, duties, or powers, can in no wise be influenced by an inferior and subordinate authority.”

It was, moreover, the view of the Court of Appeals below as expressed at page 435 of 334 F. 2d that:

“The principles of law announced in repeated opinions of the Supreme Court seem to us clearly to lead to the conclusion that as to the original patent, lease or other grant from the United States, federal law controls in determining title in its broadest sense, including strictly legal title, trust rights and any and all equitable or beneficial interests. *Gibson v. Chouteau*, 1871, 80 U.S. (13 Wall.) 92, 101, 102; *Sparks v. Pierce*, 1885, 115 U.S. 408, 413; *Van Bracklin v. State of Tennessee*, 1886, 117 U.S. 151, 168; *Widdicombe v. Childers*, 1888, 124 U.S. 400, 405; *Felix v. Patrick*, 1892, 145 U.S. 317, 328; *United States v. Colorado Anthracite Co.*, 1912, 225 U.S. 219, 223; *Buchser v. Buchser*, 1913, 231 U.S. 157, 161; *Ruddy v. Rossi*, 1918, 248 U.S. 104, 106, 107; see also other cases cited in 73 C.J.S. Public Lands, Section 209, and 42 Am. Jur., Public Lands, Section 37.”

As the Fifth Circuit also pointed out on page 435, the same principle was recognized by the Supreme Court of Louisiana in *Kittridge v. Breaud*, 39 Am. Dec. 512 (La. 1843) where the court had before it a controversy between citizens of Louisiana involving the title to lands patented by the United States. The defendant stood on the legal title in him as evidenced by the patent from the United States which

he held. However, the plaintiff was clearly the equitable holder and the Louisiana Supreme Court had no hesitancy in holding his equitable title superior to the defendant's legal title, saying: (R. 83)

“ . . . And the principle is well recognized in our jurisprudence, as well as in that of the courts of the United States, that where an equitable right, which originated before the date of the patent, whether by first entry or otherwise, is asserted, it may be examined into: *Bush v. Ware*, 15 Pet. 93; *Bouldin v. Massie*, 7 Wheat. 149.”

The foregoing cases are clearly and decisively on point in the issue presented in the case at bar and allow no other conclusion but that federal law must be applied to govern the question of McKenna's interest in the federal oil and gas lease which is the subject of his controversy with Wallis.

We take cognizance of the opposition's attempt to distinguish *Massie v. Watts* and *Irvine v. Marshall* on two bases: First, that title had not passed from the United States; and second, that the cause of action did not accrue until Wallis' refusal to convey. Such efforts to distinguish are not valid because the Court made it crystal clear that it was referring to equitable rights originating prior to the issuance of the patent. In *Massie v. Watts*, the patent had issued. In *Irvine*, the certificate of purchase had issued. In *Kittridge v. Breau*, the patent was held by the defaulting party. It is immaterial when the unsuspecting first discovers he has been defrauded. Discovery does not create the right.

This Court, moreover, has recently expressed the view that, “Unlike a land patent, which divests the Government of title, Congress under the Mineral Leasing Act has not only reserved to the United States the fee interest in the leased land, but has also subjected the lease to exacting restrictions and continuing supervision by the Secretary [of the Interior].” *Boesche v. Udall*, 373 U.S. 472, 478 (1962).

The scheme of oil and gas leasing under the Mineral Leasing Act ⁷ is entirely federal in scope and can in no way tolerate the interdiction by state law as to who can or cannot, or who may or may not, qualify to participate in an interest in the lease hold. The Congress in the Act has in precise, and exhaustive, detail established the aggregate acreage covering which persons may hold, own or control at one time oil and gas leases "acquired directly from the Secretary under this Act or otherwise"⁸ or may hold, own or control options to acquire interests in such leases,⁹ taking into account also in the same Section of the Act the combined interests of members of associations and stockholders of corporations,¹⁰ forbidden interests acquired by descent, will, judgment or decree;¹¹ the cancellation, forfeiture and disposal of interests in excess of acreage limitations,¹² as well as the effect thereof on the title or interest of a bona fide purchaser of a lease, an interest in a lease or an option in connection therewith;¹³ and unlawful trusts, including conspiracies in restraint of trade.¹⁴

The Congress has provided that federal oil and gas leases "may be assigned or subleased, as to all or part of the acreage included therein, subject to final approval by the Secretary and as to either a divided or undivided interest

⁷ 30 U.S.C.A. §§ 181 *et seq.* All lands subject to disposition under the Act, or so-called public domain lands, "which are known or believed to contain oil or gas deposits may be leased by the Secretary of the Interior." *Id.* at § 226(a).

⁸ § 184(d)(1).

⁹ § 184(d)(2).

¹⁰ § 184(e) and (f).

¹¹ § 184(g).

¹² § 184(h)(1) and (j). See also § 188.

¹³ § 184(h)(2) and (i).

¹⁴ § 184(k).

therein, to any person or persons qualified to own a lease”¹⁵ under the Act, stating that the Secretary “shall disapprove the assignment or sublease only for lack of qualification of the assignee or sublessee or for lack of sufficient bond.”¹⁶ It has also legislated the conditions by which a lessee may file a written relinquishment of all rights under a federal oil and gas lease¹⁷ and as to the forfeiture and cancellation of leases which have been issued “whenever the lessee fails to comply with any provisions [of the Act], of the lease, or of the general regulations promulgated under [the Act],” as well the possible reinstatement thereof.¹⁸

Under the Mineral Leasing Act, as amended, if the lands are within any known geological structure of a producing oil and gas field, they are to be leased to the highest responsible bidder on the basis of competitive bids¹⁹ or if the lands are not within such a structure, they are to be leased to the person first making an application for lease who is qualified to hold a lease under the Act without competitive bidding.²⁰ Other provisions are also included in the Act which set forth detailed guidelines in the working and other aspects of the federal leasing program thereunder.²¹ The Secretary, moreover, is authorized “to prescribe the necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of [the Act].”²²

¹⁵ § 187a.

¹⁶ *Ibid.*

¹⁷ § 187b. As to the authority of the Secretary to accept the surrender of a lease, see § 188a.

¹⁸ § 188.

¹⁹ § 226(b).

²⁰ § 226(c) which is the basis upon the subject lease was issued.

²¹ E.g., §§ 209, 225, 226, 226-1. See also §§ 191 and 192.

²² § 189.

It is manifestly clear from the provisions of the Mineral Leasing Act that even following the issuance of a lease has been no surrender by the federal government of its jurisdiction over, and concern with the detailed workings of, the lease. The lessee is not free to work the lease according only to his own will and terms and his lease will revert in a number of instances to the federal government. The fee interest in the lands covered by the lease remains in the federal government whose involvement in the lease is continuing from its issuance until its termination or abandonment.²³ Accordingly, the federal oil and gas lease bears no resemblance to, and falls far short of, the divestiture of the federal government's ownership and control as in the land patents with which the *Irvine* and other cases cited above were concerned. It is thus a *fortiori* that McKenna's interest in the lease at issue must be determined by federal law.

In the disposition of its lands, the rule of property promulgated by the United States Supreme Court in the decisions hereinbefore cited has become fixed, and has been the law well over a hundred years. As late as 1957, as the culmination of intensive study, "Report Of The Interdepartmental Committee For The Study Of Jurisdiction Over Federal Areas Within The States," in two volumes, was printed by the United States Printing Office. In Volume 2 at page 273, this distinguished group placed its stamp of unqualified approval on *Gibson v. Chouteau, supra, Bagnell v. Broderick, supra, Wilcox v. Jackson, supra, and Irvine v. Marshall, supra.*

The wisdom of the law has decreed that rules of property should remain stable, should be overturned only with great

²³ As this Court expressed it in *Boesche*, " . . . [The Secretary of the Interior] may direct complete suspension of operations on the land . . . or require the lessee to operate under a cooperative or unit plan . . . and he may prescribe, as he has, rules and regulations governing in minute detail all facets of the working of the land . . . " (373 U.S. at 478).

reluctance and for the most pressing of need. The Supreme Court in *U.S. v. Title Ins. & Trust Co. et al.*, 265 U.S. 472, 486-487 (1923) quoted with approval its language set forth in *Minnesota Company v. National Company*, 70 U.S. (3 Wall.) 332 (1865), as follows:

“Where questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be considered open. Such decisions become rules of property, and many titles may be injuriously affected by their change. Legislatures may alter or change their laws, without injury, as they affect the future only; but where courts vacillate and overrule their own decisions on the construction of statutes affecting the title to real property, their decisions are retrospective, and may affect titles purchased on the faith of their stability. Doubtful questions on subjects of this nature, when once decided, should be considered no longer doubtful or subject to change.”

Borrowing from the language of this Court in *U.S. v. Title Ins. & Trust Co. et al.*, *supra*, “That rule often has been applied in this and other courts, and we think effect should be given to it in the present case.”

2. Uniformity Demands It

As is clearly evidenced from the sweeping provisions of the Mineral Leasing Act, the Congress has demonstrably undertaken to delineate in thorough detail the policies and procedures to be followed in administering the federal oil and gas leasing program. In 1955, the then Solicitor of the Department of Interior pointed out (Vol. 1, p. 45, Rocky Mountain Mineral Law Institute) that the U.S. was then producing oil at the rate of 130,000,000 barrels per year from U.S. lands under the jurisdiction of the Department of the Interior. On March 31, 1955, there were 95,575 leases embracing 71,600,000 acres of public land in 24 states and Alaska, or an area larger than the State of Colorado. The staggering importance today of this vital resource to the

United States is quickly seen in the tremendous increase in the foregoing figures. During the year 1961 (Release Interior 3289 of 3/27/62), there were 152,220 leases embracing 112,172,040 acres and producing 291,900,000 barrels of oil through 30,000 producible wells. The value of this oil was in excess of one billion dollars.

Late last year, the U.S. Geological Survey released more recent figures. Such reveal that in 1964 the value of oil and gas produced on the lands of the United States accounted for more than 12% of the total value of all oil and gas produced in the United States compared with less than 6% in the year 1955. Or to express it differently, the value of oil and gas produced increased from \$453,000,000 in 1955 to \$1,274,000,000 in 1964.

Allowing the interstices of such a program to be filled by the variables and contradictions which may, and often-times do, characterize the policies and procedures when moving from one state to the next ²⁴ may threaten the free flow of implementation which thus far has proved a marked success. Uniformity must therefore govern the filling of these interstices, particularly where Congress, as in federal oil and gas leasing, has so extensively dealt with the details

²⁴ An example of this which is pertinent to the subject case is the contradiction of the Louisiana law relating to constructive and resulting trusts when viewed in the light of the law followed by the preponderance of jurisdictions. See *e.g.*, the dissent below (344 F. 2d at 437). In this connection, the Court in the Irvine case observed, "... And *cuio bono*, should this mischief be permitted? Simply to favor a visionary innovation for the destruction of resulting trusts and equitable titles, a class of titles resting upon the essential elements of all honest titles, *truth* and *justice*, and coeval with the very rudiments of equity law. And this innovation, too, to be extended not merely to cases which from contestation or from defective proof might be uncertain or hazardous, but to instances which shall forbid to persons willing and proffering the fulfillment of their duty, the power to do so. The power of being honest, a power surely not so often exerted as to merit being repulsed as obtrusive and ungracious." (61 U.S. at 562).

of the program. This is the transcending principle which is essential and must necessarily be applied to the case at bar.

And it matters not that the subject case involves a controversy between private parties. The Congress in its wisdom has specifically determined upon a policy that leases "may be assigned or subleased, as to all or part of the acreage included therein, subject to the final approval by the Secretary and as to either a divided or undivided interest therein" and that the Secretary "shall disapprove the assignment or sublease only for lack of qualification of the assignee or sublessee or for lack of sufficient bond." (30 U.S.C.A. § 187a.). The direction by the Congress to allow assignments and subleases is clear and unequivocal and it was assuredly not contemplated that one or two states could step in and say, in contradistinction to the overwhelming number of jurisdictions, that the form of one's agreement did not qualify that person to receive an interest in a federal lease, thereby substituting, in a sense, the minority state's judgment for the Congress.²⁵

²⁵ Even within a state, the vagaries of circumstances and of the application of its laws may subject a question to unpredictable turns. In Louisiana, for example, the law on oil and gas had been in considerable confusion before 1938. See *e.g.*, *Gulf Refining Co. of Louisiana v. Glassell*, 186 La. 190, 170 So. 846 (1936). It was held in that case that a contract of lease created in the lessee a personal right which, had it continued to represent the law, would have essentially placed Louisiana in line with the other jurisdictions from the general standpoint of allowing parole evidence alone to establish McKenna's interest in the subject lease. The court in *Reagan v. Murphy et al.*, 235 La. 529, 536, 105 So.2d 210, 212 (1958) described what happened after the Glassell case in these words, "... This pronouncement was not well received by the oil industry and, through its efforts, the Legislature, at its regular session of 1938, enacted Act 205 [now LSA-R.S. 9:1105] which classified oil and gas leases as real rights . . ." Following the enactment of the aforesaid law, the confusion continued as evidenced by, among other cases, *Lawrence v. Sun Oil Co. et al.*, 166 F.2d 466 (5th Cir. 1948); *Perkins v. Long-Bell Petroleum Company, Inc.*, 227 La. 1044, 81

The Court in *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173, 176 (1942) commented as follows:

"It is familiar doctrine that the prohibition of a federal statute may not be set at naught, or its benefits denied, by state statutes or state common law rules. In such a case our decision is not controlled by *Erie*. . . . There we followed state law because it was the law to be applied in the federal courts. But the doctrine of that case is inapplicable to those areas of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law. . . . When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield. . . ."

Other cases, though unrelated in their general facts to the case at bar, might be noted in connection with the broader area involving the application of federal law as opposed to local law. *Holmberg v. Armbrecht*, 327 U.S. 392 (1946) involved the application of the federal equitable rule that a statute of limitations does not begin to run until the fraud has been discovered, instead of the New York statute which would have barred the suit between private parties to enforce the liability imposed upon bank stockholders by the Federal Farm Loan Act. It was held in

So.2d 389 (1955); *Arnold et al. v. Sun Oil Co.*, 218 La. 50, 48 So.2d 369 (1949); *Coyle et al. v. North American Oil Consolidated et al.*, 201 La. 99, 9 So.2d 473 (1942); *Amerada Petroleum Corporation v. Reese et al.*, 195 La. 359, 196 So. 558 (1940); *Reagan v. Murphy et al.*, *supra*. In *Hayes et al. v. Muller*, 245 La. 356, 158 So.2d 191 (1963), involving a parole contract respecting an oil and gas lease, the court initially held on April 29, 1963 that a cause of action was nonetheless stated, only to reverse itself on rehearing on November 12, 1963.

Bomar v. Keyes et al., 162 F. 2d 136 (2d Cir. 1947) that regardless of state law, the filing of the complaint tolls the state statute of limitations where suit has been filed on a federal claim. Whether, under the federal copyright law, an author's illegitimate child came within the term "children" was viewed primarily a matter of state concern in *DeSylva v. Ballentine*, 351 U.S. 570, 580 (1956). there being "no federal law of domestic relations." Accordingly, the law of California, the only state involved, was applied with the Court nonetheless saying at page 580:

"... This does not mean that a State would be entitled to use the word 'children' in a way entirely strange to those familiar with its ordinary usage, but at least to the extent that there are permissible variations in the ordinary concept of 'children' we deem state law controlling. . . ."

It was held in *Francis et al. v. Southern Pacific Co.*, 333 U.S. 437 (1948) that the rights of an employee of a railroad killed in Utah (where suit was filed in federal court) while riding on a pass, not in connection with his duties as a railroad employee, were to be governed by federal, not Utah, law. The action in *Levinson et al. v. Deupree*, 345 U.S. 648 (1953), involving a collision on the Ohio River in Kentucky, was based upon a state-created right but would have been barred by the Kentucky statute of limitations had not federal law been applied, the suit being in admiralty. Federal law was also applied in *Dyke v. Dyke*, 277 F. 2d. 461 (6th Cir. 1955) which was an action to determine the rights to the proceeds of a National Service Life Insurance on the life of an ex-serviceman. Where the telegraph company in *O'Brien v. Western Union Telegraph Co.*, 113 F. 2d. 539 (1st Cir. 1940) was sued in tort for having transmitted a libellous message, federal law was applied with the court observing at page 541:

"... Congress having occupied the field by enacting a fairly comprehensive scheme of regulation, it seems clear that questions relating to the duties, privileges

and liabilities of telegraph companies in the transmission of interstate messages must be governed by uniform federal rules. . . ."

In *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961), the question was whether the application of the New York statute of frauds should be applied to an alleged contract between a steward employed on defendant's vessels. The District Court dismissed on the ground that the New York statute applied. The Second Circuit affirmed. On certiorari, this Court held to the contrary because, (1) the contract was a maritime contract, and (2) the application of state law would disturb the uniformity of maritime law. To quote:

"In this posture of things two questions must be decided: *First*, was this alleged contract a maritime one? *Second*, if so, was it nevertheless of such a 'local' nature that its validity should be judged by a state law?"

The Court further said at page 741:

"Turning to the present case we think that several considerations point to an accommodation favoring the application of maritime law. It must be remembered that we are dealing here with a contract and, therefore, with obligations, by hypothesis, voluntarily undertaken, and not as in the case of tort liability or public regulations, obligations imposed simply by virtue of the authority of the State or Federal Government. *This fact in itself creates some presumption in favor of applying that law tending toward the validation of alleged contract.* . . . As we have already said, it is difficult to deny the essentially maritime character of this contract without either indulging in fine-spun distinctions in terms of what the transaction was really about, or simply denying the alleged agreement that characterization by reason of its novelty. . . On the other hand, we are hard put to perceive how this contract was 'peculiarly a matter of state and local concern,' . . . unless it be New York's interest in not lending her courts to the accomplishment of fraud, something which appears to us insufficient to overcome the counter-

vailing considerations. Finally, since the effect of the application of New York law here will be to invalidate the contract this case can hardly be analogized to cases such as *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 68 L. Ed. 582, 44 S. Ct. 274, or *Just v. Chambers*, 312 U.S. 383, 85 L. Ed. 903, 61 S.Ct. 587, both *supra*, where state law had the effect of supplementing the remedies available in admiralty for the vindication of maritime rights." (Emphasis Added)

Insofar as commerce in property in general has been concerned, uniformity in the legal aspects has been and is always, not only desirable but eagerly sought. Such enhances the free and untrammelled course of transactions in the development of resources and trade. That uniformity is desirable for private parties, and has long been sought by Bench and Bar for the benefit of society, can be seen in the energies and time devoted to the compilation and adoption of many uniform acts, including, *inter alia*, the Uniform Negotiable Instruments Law, the Uniform Sales Act, the Uniform Warehouse Receipts Act, the Uniform Stock Transfer Act, the Uniform Corporation Act, the Uniform Partnership Act, the Uniform Limited Partnership Act, the Uniform Commercial Code, not to mention the entire Restatement Series. It is pure sophistry to advance the position that the United States Supreme Court is to be concerned only with the uniform enforcement of the rights of the federal government.

So it is that the Congress has also written into the Mineral Leasing Act of 1920 and in the Mineral Leasing Act for Acquired Lands of 1947 a comprehensive policy to govern the federal oil and gas leasing program which has been implemented by the Secretary of the Interior in meticulous and detailed regulations. The interest of the federal government in the lease does not end at the point of its issuance but continues through the term of the leasehold to dominate "in minute detail all facets of the working of the land." (373 U.S. at 478). Assignments are specifically included

within the ambit of the congressional policy governing the leasing program and it must not be state, but federal, law which should be applied with respect thereto.

3. The Choice of Law Demands It

Assuming for the purpose of this argument that Louisiana law is to be applied here, because such is the law of the forum and is so required by Erie, nonetheless, the Louisiana Supreme Court has exercised its power under the doctrine of Choice of Law. It could have drawn no distinction between lands of its own state or lands of the United States, but the Louisiana Court of Last Resort preferred to draw such distinction and to ignore its own Napoleonic code when it dealt with lands of the United States. Accordingly, in *Kittridge v. Breaud*, *supra*, it chose to apply the general law to equitable titles in lands of the United States. *Kittridge v. Breaud* was decided in the year 1843. At that time there was in existence and had been since the years 1804, 1808 and 1825 the same statutes as to immovables sought to be applied by the District Court below.

Consequently, if the federal court feels constrained to follow the rule laid down by the Supreme Court of Louisiana, it must hold in favor of McKenna, as *Kittridge v. Breaud* remains the law of the State of Louisiana.

4. Justice Demands It

Stripped of all artificial rules, there can be no doubt that simple stark justice requires that a joint venturer be not divested of his rights willy-nilly. The joint venture relationship has been accepted and enforced almost unanimously. See 18 A.L.R. 484 (1922), 95 A.L.R. 1242 (1935), *Libbey v. L. J. Corporation et al*, 101 U.S. App. D. C. 81, 247 F. 2d 78 (1957) and *Johnston et al. v. Goggin et al*, 323 F. 2d 36 (5th Cir. 1963). In the dissenting opinion below was the acknowledgment that "These great tools of justice are effectively used in other states to rectify the effects of bad faith."

Irvine v. Marshall, supra, may have been rendered over a hundred years ago but the language therein contained has continued to flourish and in no manner has been diminished with the passage of time. Equitable title still remains "A class of title resting upon the essential elements of all honest titles, truth and justice, and co-eval with the very rudiments of equity law."

Nor is the age-old aspiration of man for justice to be squelched by damming their quest for such justice to the status of a "private dog fight."

5. Naught to the Contrary Exists in Erie

Volumes have been written about Erie and unquestionably volumes more will be written. Whatever decision here the Court makes, it should do so on a rational and realistic view of what is involved.

The lands owned by the United States in this suit are part of the marginal sea and not in the confines of any state. Accordingly, we are not here concerned with a state statute regulating transactions affecting its real property, nor are we here concerned with a transaction in a state between its citizens. On the contrary, McKenna in Washington and Wallis in New Orleans entered into a joint venture to obtain a lease on property of the United States in the marginal sea. All of the events to take place and which did take place were in the District of Columbia with the Department of the Interior. If "substantive" law is to be considered, such would be that of the District of Columbia which recognizes joint ventures.

Under the "Choice of Law" doctrine, the Louisiana State Court could readily recognize this to be true and, even if it did not hold that federal law was to be applied, it could hold sensibly and logically that the substantive law of the District of Columbia controls. It is equally true that under the Choice of Law the Courts of the State of Louisiana could recognize what has just been stated, but at the same

time hold as a matter of "procedure" that it would not entertain oral testimony to substantiate a joint venture.

Consequently, in the context of Erie the clash at its widest is the narrow issue of whether or not the interest of uniformity in the rules of property to be attached to transactions involving oil and gas leases on property of the United States should yield to a matter of procedure and that in the very vague, unsatisfactory, chaotic area of Choice of Law. This brief would be unduly lengthy if we were to undertake to develop to the fullest extent the vagaries of the doctrine of the Choice of Law. This Honorable Court as recently as 1964, in the case of *Van Dusen v. Barrack*, 376 U.S. 612, had occasion to consider the shifting sands to be encountered in this field of jurisprudence. Erie was made to yield to the realities of the situation and to the interest of justice. A calm, dispassionate view of the particular situation before this Court presented by this case should bring the conclusion that the accident of the forum does not have the dignity to override the true objective of uniformity which is to enable the citizen to traffic in realty on the basis of stable, consistent rules of property.

B. IF THIS COURT HOLDS THAT THE LAW OF LOUISIANA DOES CONTROL, THE CASE SHOULD BE REMANDED FOR A DETERMINATION THAT THE WRITINGS IN THE RECORD MEET THE REQUIREMENTS OF SUCH STATE LAW.

In addition to arguing the application of federal law, McKenna, in the court below, also contended that even if the laws of Louisiana were applicable there was compliance therewith in the exchange of correspondence between the parties during 1954-1956 and until Wallis unilaterally attempted to terminate the agreement. McKenna argued that these writings manifestly demonstrated the existence of a joint venture, beginning in 1954, to obtain a federal oil and gas lease on the lands in question, as well as his interest therein.

McKenna further contended that his interest in the realty was specifically and formally confirmed in writing by Wallis in the letter of December 27, 1954, and that the trial court erred when it held that this confirmation by Wallis did not comply with the statute of frauds because it referred only to the serialized numbers of the acquired lands applications, as well as the lease itself, and not to the public domain application and lease. As McKenna argued, it is the realty or a lease thereon, ~~not~~ the classification of the realty as being acquired lands or public domain or the serialized numbers of the applications for lease, that constitute the immovable for the interest in which the evidence must be in writing.

He pointed out, among other things, that the sole purpose of filing either an acquired lands application or a public domain application can only be to obtain a federal oil and gas lease in and to particular realty owned by the United States. Without such as its aim, a filing would be vacuous. So, when the acquired lands applications were filed in June of 1954, pursuant to the McKenna-Wallis agreement of the preceding March, it was to obtain a federal oil and gas lease on the realty described in the applications. Its purpose had nothing to do with the numbers on the applications which were merely administrative nor whether the land was acquired or public domain. These applications were filed simply because both parties wanted an oil and gas lease on a particular tract of land. This then was the purpose for which the joint venture was necessarily formed and it was not to file only acquired lands applications with certain designated numbers.

The majority below, however, did not reach the issue of compliance with the Louisiana law, holding, instead, that federal law should govern the case. If this Honorable Court concludes that the Circuit was in error, this case should be remanded to it for a determination that, as we insist, the writings in evidence fully meet the requirements of the Louisiana statute.

CONCLUSION

Appellee McKenna respectfully urges this Honorable Court to affirm the opinion and order of the Circuit below, but if such is not the ruling of this Court, then this appellee urges that the case be remanded for a full review of the record in the light of the Louisiana statutes.

Respectfully submitted,

E. L. BRUNINI
Suite 1440, First National
Bank Building
Jackson, Mississippi 39205
Attorney for
Patrick A. McKenna.

Certificate of Service

I, E. L. Brunini, hereby certify that a copy of the foregoing Brief For Patrick A. McKenna, was served upon Counsel of Record, representing Petitioner Floyd A. Wallis, and, representing Respondent, Pan American Petroleum Corporation, and the Solicitor General, Department of Justice, Washington 25, D. C., by enclosing each such copy in an envelope, duly addressed to each such Counsel of Record and the Solicitor General, at his post office address, with the required air mail first class postage prepaid and affixed thereto, and depositing same in the United States Post Office at the District of Columbia, on this the day of January, 1966.

Counsel of Record for
Patrick A. McKenna

No. 341

FILED

FEB 7 1968

IN THE

JOHN F. GAVIN, CLERK

Supreme Court of the United States

OCTOBER TERM, 1968

FLOYD A. WALLIS,

Petitioner,

VERSUS

PAN AMERICAN PETROLEUM CORPORATION,

Respondent.

FLOYD A. WALLIS,

Petitioner,

VERSUS

PATRICK A. McKENNA,

Respondent.

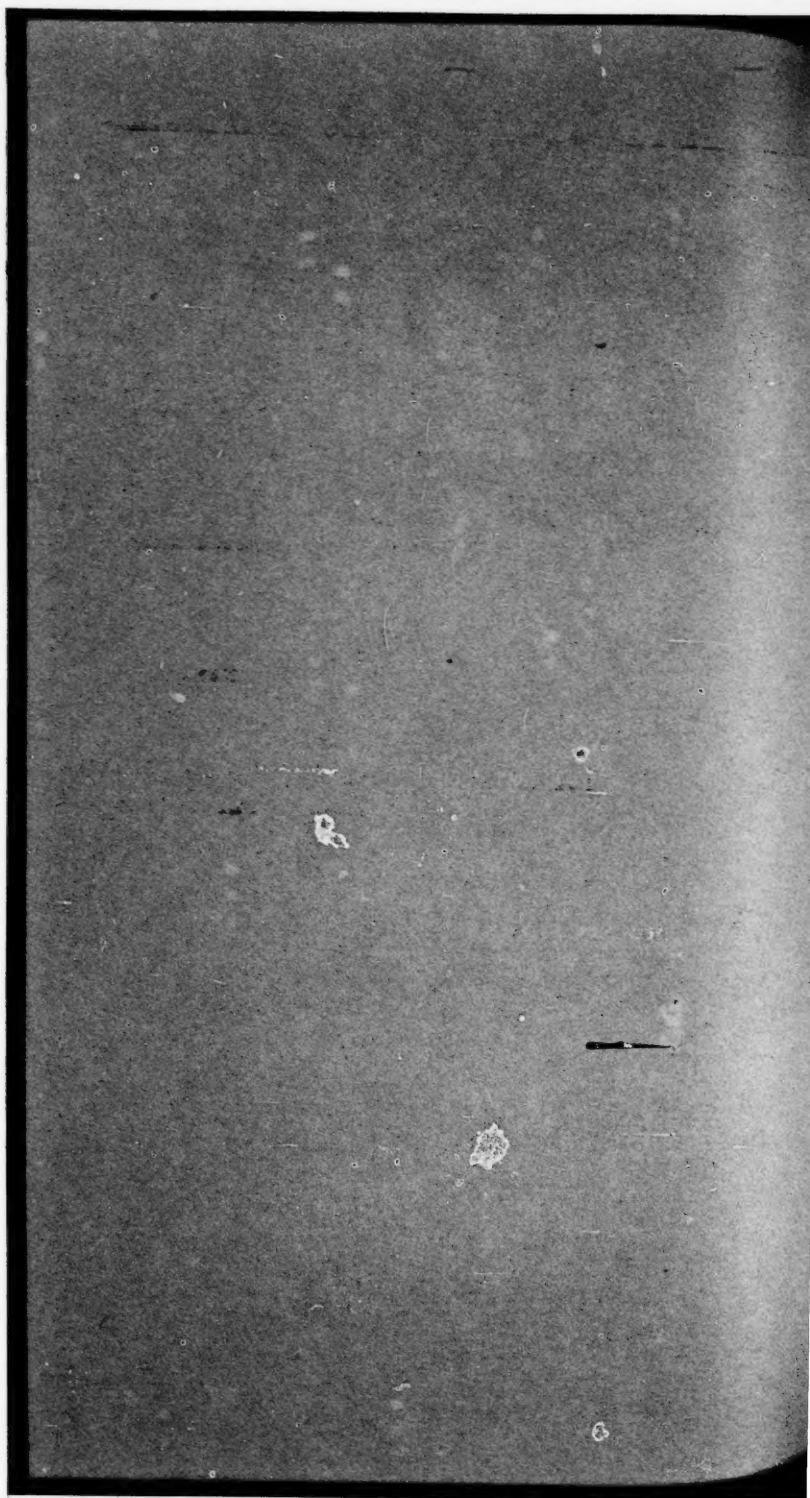
On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF FOR PAN AMERICAN PETROLEUM CORPORATION

LLOYD J. COBB
MORRIS WRIGHT
METTERTY L. SHERRY, JR.
302 Whitney Building
New Orleans, Louisiana

WILLIAM P. HARDMAN
PERCY SANDEL
1916 St. Charles Avenue
New Orleans, Louisiana

Attorneys for Respondent,
Pan American Petroleum
Corporation



INDEX

	Page
STATEMENT OF CASE	3
SUMMARY OF ARGUMENT	10
ARGUMENT	11
1. Federal Law is Applicable	11
2. The Mineral Leasing Act for Public Domain Land	18
3. Boesche v. Udall	29
4. Uniformity	32
5. Issues asserted on merits of the case by Pan American but not passed upon by the Court of Appeals	37
CONCLUSION	48

CASES

Akin v. Louisiana National Bank of Baton Rouge, 322 F. 2d 749 (1963)	36
American Pipe & Steel Company v. Firestone Tire & Rubber Company, 149 F. 2d 872 (1945)	26
Arizona v. California, 373 U.S. 546 (1963)	23
Bank of America National Trust & Savings Ass'n v. Parnell, 352 U.S. 29 (1956)	20, 26, 47
Boesche v. Udall, 373 U.S. 472 (1963)	29, 30
Camfield v. United States, 167 U.S. 518 (1897)	28
City of Fresno v. California, 372 U.S. 267 (1963)	22
Clearfield Trust Company v. United States, 318 U.S. 363 (1943)	20, 26, 32

II CASES (Continued)

	Page
D'Auricourt v. Seeger, 169 La. 620, 40 So. 542 (1906) reh. denied	45
Erie R. Company v. Tompkins, 304 U.S. 64 (1938)	31
Federal Power Commission v. Southern Cal. Edison Co., 376 U.S. 205 (1964)	24
First Iowa Hydro-Elec Cooperative v. Federal Power Commission, 328 U.S. 152 (1946)	24
Francis v. Southern Pacific Company, 333 U.S. 445 (1947)	26
Fort Leavenworth R.R. v. Lowe, 114 U.S. 525 (1885)	28
George W. Garig Transfer, Inc. v. Harris, 226 La. 117, 75 So. 2d 28 (1954) reh. denied	2, 44
Hodgson v. Federal Oil and Development Company, 274 U.S. 15 (1927)	32
Hood v. McGehee, 237 U.S. 611 (1915)	36
Hunt v. United States, 278 U.S. 96 (1928)	28
Irvine v. Marshall, et al, 61 U.S. (20 How.) 558 (1858)	16
Ivanhoe Irrigation District v. McCracken, 357 U.S. 275 (1958)	21
Levitt v. Johnson, 334 F. 2d 815 (1964)	26
Lloyd v. Dickson, 116 La. 90, 40 So. 542 (1906) reh. denied	44
McCullough v. Maryland, 4 Wheat 316 (1819)	28
McKelvey v. United States, 260 U.S. 353 (1922)	28

III CASES (Continued)

	Page
Massie v. Watts, 6 Cranch 148 (1810)	13, 14, 16, 17
Morgan v. Udall, 113 U.S. App. D.C. 192, 306 F. 2d 799 (1962), cert. den'd 371 U.S. 941	7, 40
National Metropolitan Bank v. United States, 323 U.S. 454 (1944)	26
Ohio v. Thomas, 173 U.S. 276 (1899)	28
Onorato v. Maestri, 173 La. 375, 137 So. 67 (1931), reh. denied	43
Pan American Petroleum Corporation v. Pierson, 284 F. 2d 649 (1960)	29
Pan American Petroleum Corporation v. Wallis, 344 F. 2d 432 (1965)	26
Paul v. United States, 371 U.S. 245 (1963)	28
Ringo v. Binns, 10 Peters 269 (1836)	15
Royal Indemnity Company v. United States, 313 U.S. 389 (1941)	26
Seaton v. Texas Co., 256 F. 2d 718 (1958)	41
Sola Electric Company v. Jefferson Electric Company, 317 U.S. 173 (1942)	20, 26, 31
Southern Pacific Company v. Jenson, 244 U.S. 205 (1917)	32
State of Louisiana v. Floyd A. Wallis, et al, E.D. La. Civil Action No. 9046	8
Textile Workers Union of America v. Lincoln Mills of Alabama, 353 U.S. 448 (1957)	16, 26
Udall v. Tallman, 13 L. Ed 616 (1965)	30

IV CASES (Continued)

	Page
United Gas Public Service Co. v. Christian, 186 La. 689, 173 So. 174 (1937)	45
United States v. 93.970 Acres of Land, 360 U.S. 328 (1959)	26
United States v. Standard Oil Company, 332 U.S. 301 (1947)	26, 31
United States v. Taylor, 333 F. 2d 633 (1964)	26
United States v. Trinidad Coal and Coking Co., 137 U.S. 160 (1890)	34
Utah Power & Light Company v. United States, 243 U.S. 389 (1917)	28
Walls v. Smith, 3 La. 498 (1832)	43
Welsh v. Wyatt, 164 So. 2d 393 (2nd Circuit 1964) reh. denied, certiorari denied	2, 45
Wilson v. Cook, 327 U.S. 474 (1945)	28
Witbeck v. Hardeman, 51 F. 2d 450 (1931)	29
CONSTITUTION, STATUTES AND REGULATIONS	
Boulder Canyon Project Act: 45 Stat. 1057 (1928), 43 U.S.C. § 617-617t (1958); Section 14.45 Stat. 1065 (1928), 43 U.S.C. § 617m (1958); Section 18, 45 Stat. 1065 (1928), 43 U.S.C. § 617q (1958)	23
Code of Federal Regulations, Title 43, Section 3128.1	10
Louisiana Civil Code, LSA-C.C. 2040	2, 43
Mineral Leasing Act of 1920: Act of February 25, 1920; 41 Stat. 437; 30 U.S.C. 181 et seq.	18

V AUTHORITIES (Continued)

	Page
Section 27; 30 U.S.C. 184	34
Section 30; 30 U.S.C. 187	25
Section 30; 30 U.S.C. 187A	34
Section 32; 30 U.S.C. 189	10, 19, 25, 27, 28
Reclamation Act of 1902: Section 8, 32 Stat. 390; 43 U.S.C. 383 (1958)	21
United States Constitution: Article I, Section 8, Clause 17	27, 28
Water Power Act: Section 27, 41 Stat. 1077 (1920), 16 U.S.C. § 821 (1958)	24

MISCELLANEOUS

20 Am. Jur. 2d, Courts § 208 at 543	26
I A Moore, Federal Practice 0.305 (3) at 3045, 3053 and 0.324 at 3759 (2d ed. 1961)	26
Clark, State Law in the Federal Courts: The Brooding Omnipresence of <i>Erie v. Tompkins</i> , 55 Yale L.J. 267 at 284, 285 (1946)	26
Exceptions to <i>Erie v. Tompkins</i> : The survival of Federal Common Law, 59 Harv. L. Rev. 966 (1946)	26
Federal Courts — Rules of Decision, 50 Va. L. Rev. 1236 (1964)	26
Friendly, in Praise of <i>Erie</i> — And of the new Federal Common Law, 39 N.Y.U.L. Rev. 383, 422 (1964)	27

VI AUTHORITIES (Continued)

	Page
Hart, The Relations Between State and Federal Law, 54 Colum. L. Rev. 489, 509-15, 525-35 (1954)	26, 27
Luke 16:13	13
Malone, Jr. Ross L., Oil and Gas leases on United States Government Lands, Second Annual Institute on Oil and Gas Law and Taxation, Southwestern Legal Founda- tion, at p. 315, 324 at n. 1	34
Matthew 6:24	13
Mechem on Agency, 2nd Ed. Vol. 1, Sec. 1353	42
McCulloch Oil Corporation of California, No. A-30208 (November 25, 1964)	12
Mishkin, The Variousness of Federal Law: Competence and Discretion in the choice of National and State Rules for Decision, 105 U. Pa. L. Rev. 797 (1957)	27
Pothier on Obligations, No. 212	44
Wright, Federal Courts, § 60 at 213 (1963)	26

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1965

No. 341

FLOYD A. WALLIS,

Petitioner,

versus

PAN AMERICAN PETROLEUM CORPORATION,
Respondent.

FLOYD A. WALLIS,

Petitioner,

versus

PATRICK A. McKENNA,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF FOR PAN AMERICAN PETROLEUM
CORPORATION

The opinion of the United States Court of Appeals for the Fifth Circuit under review holds that federal law, rather than the law of the State of Louisiana, is applicable herein.¹ The memorandum for the United States as amicus curiae states:

¹R. 78 and R. 107, reported at 344 F.2d 432, 439.

"Since it reversed Judge Wright on the sole ground that he had applied the wrong law, the court of appeals did not consider the correctness of the findings of fact contained in Judge Wright's opinion (he did not issue separate findings). Their correctness, accordingly, is not an issue before this Court in this case." (Page 7, footnote 4)

The brief of the Solicitor General, therefore, is restricted to the sole issue whether State or Federal law governs. The Court of Appeals did not render an opinion on the interpretation of the Option Agreement either in its original decree or on Pan American's petition for rehearing. Nor did the Court render an opinion on the applicable Louisiana law relied upon by Pan American. L.S.A.-C.C. 2040²; *Welsh v. Wyatt* (2nd Circuit 1964) 164 So. 2d 393, rehearing denied May 28, 1964, petition for a writ of certiorari to the Supreme Court of Louisiana denied on June 30, 1964; *George W. Garig Transfer, Inc. v. Harris*, 226 La. 117, 75 So. 2d 28 (1954) reh. denied.

Pan American's *ownership* of the lease is entirely independent of assertion of title by estoppel or avoidance of the parol evidence rule as relied upon by the District Court. Further, to establish *ownership* of the lease Pan American is not required to invoke the doctrine of "constructive trusts" which is recognized in the federal common law and in the common law of other states but not in Louisiana. Pan American's *ownership* is clear under Louisiana law.

²The codal article 2040 of the Civil Code provides: "The condition is considered as fulfilled when the fulfillment of it has been prevented by the party bound to perform it."

In short, Pan American is entitled to ownership of the lease and specific performance under either Federal or State law. Since the Court of Appeals did not adjudicate Pan American's rights on the merits under Louisiana law, there is no basis for affirming the judgment of the District Court, as prayed for by Wallis, even if it be assumed for the sake of argument that the Court of Appeals misconceived the applicable law. It is for that Court to review the judgment of the District Court in the light of the Option Agreement and the controlling Louisiana law.

STATEMENT OF CASE

The "Statement" in the Solicitor General's memorandum for the United States ably illustrates the distinction between "acquired" and "public domain" land and the significance thereof. (See pp. 1, 2, 3, thereof). However, it does not delineate the circumstances under which Wallis wrongfully maneuvered for his own benefit to accomplish the destruction of the original acquired lands applications UNDER OPTION to Pan American and the avoidance of his obligations under the Option Agreement³.

The Option Agreement dated March 3, 1955 covered five "acquired lands" applications. (R. 40) The acquired lands applications were the only ones pending at the time the contract was executed. Pan American's attorneys were cognizant of the form and status of the Wallis acquired lands applications and approved

³In order that all pertinent facts involved are before the Court in light of Wallis' statement of case, references will be made to the original record and Pan American's original exhibits. The printed record will be designated with the letter R.

the actions of Wallis until about August, 1955 when their connection with the applications terminated. Neither Pan American's attorneys nor Pan American itself knew of the filing of the public domain offer by Wallis for his own benefit on March 8, 1956 until *after* issuance of the lease on December 19, 1958. (R. 57)

Wallis was advised by his Washington attorney that his pending "acquired lands" applications were defective because the description did not connect with a corner of the public lands survey. To obtain the lease in controversy Wallis admittedly improved the description contained in the pending offers to make it "foolproof" and then filed, not one, but two new applications to lease:

- a. One on the "public lands" form in his own name (R. 69); and,
- b. One on the "acquired lands" form in the name of his brother-in-law, T. Miller Gordon (Pan Am's Or. Ex. B-8)

Both applications contained the identical "new" and "foolproof" description embracing *the same land* covered by the original "acquired lands" applications under option to Pan American.

Wallis filed the "public land" offer on March 8, 1956 but did not file the T. Miller Gordon "acquired lands" offer until March 27, 1956. Wallis then filed a Protest on March 26, 1956, Pan Am's Or. Ex. C-4, (the day before the T. Miller Gordon "acquired lands" offer was filed) against favorable action being taken on the pending Morgan "public lands" offer. (Pan Am's Or. Ex. C-5; C-12a)

The basis of the Protest of Wallis was, "The land in controversy is unsurveyed . . . and each offer must describe unsurveyed lands 'by metes and bounds description connected with a corner of the public lands surveys' by courses and distances (and) the metes and bounds description contained in protestee's offer is not connected with a corner of the public lands surveys". (Pan Am's Or. Ex. C-4 at p. 4) The Protest asserts that the description contained in Morgan's offer "is insufficient to identify the lands intended to be requested". The Protest filed by Wallis requested the recognition of his "public lands" offer "as entitled to priority over Protestee's said offer with respect to the land in controversy." (Pan Am's Or. Ex. C-4 at p. 8) No reference whatsoever was made by Wallis in this Protest to the pending "acquired lands" offers — either the original offers or the T. Miller Gordon offer. The record demonstrates that thereafter Wallis, an admitted agent and fiduciary under the Option, made no effort whatsoever to acquire leases under and by virtue of the "acquired lands" offers as the Option plainly obligated him to do and as he himself admits. (Pan Am's Or. Ex. A-1, p. 3, pr. 2; C-6 at pp. 33, 34; C-10 at p. 1; 65 I.D. 369, *Morgan v. Udall*, 113 U.S. App. D.C. 192, 306 F. 2d 799, cert. denied 371 U.S. 941)

The decision of the Bureau of Land Management June 7, 1956 is a demonstration that the Morgan offer was rejected on the specific ground, as asserted in the Wallis Protest (Pan Am's Or. Ex. C-4 at p. 4) that the Morgan description was not connected to a corner of the public land surveys by courses and distances, as required, and the Wallis public land application was sufficient to identify the land in accordance with the regulation (Pan Am's Or. Ex. C-10 at p. 4 and D-2 at

p. 5) The decision specifically rejected the Wallis "acquired lands" offers described in the Option "because there are no acquired lands covered in the applications." (Pan Am's Or. Ex. C-6 at p. 34) The Director said:

"It is realized that many new points have been raised by the Bureau in this decision which were not before in issue between the applicants nor has an opportunity been afforded the parties in interest to answer these issues. Therefore, all parties are given 30 days in which to show cause, and to submit evidence and briefs, if they desire, why action should not be taken in accordance with the views expressed herein." (Pan Am's Or. Ex. C-6 at pp. 33-34)

While Wallis testified that "I am not attempting to prosecute that suit up there to the exclusion of the acquired lands application" (Or. Supp. R. 23) he ignored the "opportunity" afforded by the Bureau. (Pan Am's Or. Ex. C-6 at pp. 33-34) The fact is that neither Wallis nor Morgan objected to the decision of the Director that the character of the land was "public land" and not "acquired land." (Pan Am's Or. Ex. C-10; D-11 at p. 4) Wallis insists it would have been "foolhardy" for him to do so. (Or. Supp. R. 12) His counsel had advised him on February 3, 1956, that the description in the original "acquired lands" applications was "vulnerable". (Pan Am's Or. Ex. B-6) The strawman Gordon offer was not involved in the Director's decision, which specifically refers only to the five "ac-

quired lands" offers described in the Option. (Pan Am's Or. Ex. C-10)

On the appeal of Morgan to the United States District Court for the District of Columbia in *Morgan v. Udall*, 113 U.S. App. D.C. 192, from the decision of June 7, 1956, Edelstein, counsel for Wallis, vigorously asserted the lands were "public lands" and not "acquired lands". (Pan Am's Or. Ex. D-10) However, Judge Hart did not decide the disputed "character" of the land and merely held that on the Administrative Record before the Secretary, as stipulated by the parties to the action:

"a. There was *substantial* evidence to support the decision of the Secretary of the Interior rejecting Morgan's applications and granting Wallis' public lands applications."

"b. The Secretary of the Interior was not *arbitrary* or *capricious* in reaching that decision."

(Pan Am's Or. Ex. D-11 at p. 6)

United States District Judge Hart held as a fact that:

"The Director ruled that neither party had shown cause why the acquired lands offers should not be rejected and, accordingly, he ordered the final rejection of these offers and closing of the case." (Pan Am's Or. Ex. D-11 at p. 4)

Neither Judge Hart nor the U. S. Circuit Court of Appeals, as demonstrated by their respective decisions, has held that the land involved — in fact and in law — is “public domain” land of the United States. Their decisions simply affirm an Administrative Ruling to which Wallis neither objected nor offered any evidence or argument to contradict. (Pan Am’s Or. Ex. D-11)

The Federal District Court recognized (Note 2) that the pending suit styled “*State of Louisiana vs. Floyd A. Wallis, et al.*,” E.D. La., C.A. 9046, involved the assertion by the State of Louisiana of title to the land involved here and disputes the right of the United States to grant the lease covering that acreage.⁴ (R. 66)

Petitioner, upon the issuance of the public lands lease BLM 042017, took the position that the Option covered only leases issued in direct response to the acquired

⁴Shortly after the issuance of the lease to Wallis, he applied for a permit to drill and staked a well location on the lease. He was prevented from operating by action of the State of Louisiana which sought an injunction in the State court. This action was transferred to the United States District Court for the Eastern District of Louisiana. (*State of Louisiana v. Floyd A. Wallis, et al.*, E.D. La. Civil Action No. 9046). The California Company and Shell Oil Company, who own leases from the State of Louisiana covering the Wallis lease lands, and Pan American made appearances in the suit. At the suggestion of the court, Wallis, the lessee of the United States, Shell and California, the lessees of the State of Louisiana, and Pan American entered into an operating agreement without prejudice to the respective claims of the parties. The disputed property was developed and is now being operated thereunder by Shell Oil Company, the designated Operator, for the parties ultimately determined to be the owners. The suit of the State of Louisiana was dismissed.

lands applications specifically referred to in the Option Agreement and, for that reason, refused to assign BLM 042017 to Pan American.

The District Court denied specific performance. (R. 65)

Pan American in its original and reply briefs before the Court of Appeals urged that if Louisiana law was held to be applicable: 1. The Option Agreement in clear and unambiguous terms covers and attaches to the lease; and, 2. Wallis under Louisiana law could be compelled to assign the lease to Pan American without resort to parol testimony.

In the original opinion of the Fifth Circuit, the Court held that "the district court committed fundamental error in applying Louisiana statutes and law to determine rights in a lease on public domain land which were and are subject only to the sovereignty of the United States" (R. 80) and "the doctrine of resulting trusts . . . may have application to the facts of this case." (R. 81) Each party to the litigation filed a timely petition for a rehearing and supporting briefs. (R. 108) This opinion was confirmed by the majority on rehearing and the judgment of the District Court was vacated and the cause remanded for re-trial upon the evidence already taken and any additional relevant evidence, and for full and complete findings of fact and conclusions of law on all issues under the applicable principles of federal law. (R. 114)

SUMMARY OF ARGUMENT

1. The Federal Government has an interest under the Mineral Leasing Act of 1920 requiring a uniform rule of law in a suit between private individuals to discourage inceptive fraud in the processing of federal leases. Furthermore, the physical location of the public domain land in Louisiana and the domicile of Wallis in Louisiana are incidental to the determination of title to a federal lease.

2. Section 32 of the Mineral Leasing Act of 1920, 30 U.S.C. 189, does not deprive the federal courts of the responsibility to develop federal common law in aid of the uniform implementation and protection of federal interests.

3. The Mineral Leasing Act is federal in scope. The issuance of a mineral lease, unlike a patent, does not divest the United States of "all authority or control" and the lease remains under the continuing supervision of the government. True ownership of a lease is not such a local matter as may be determined by a unique rule of Louisiana law. The parol evidence rule itself is uncertain and ambiguous. The rule is in direct conflict with 43 C.F.R. 3128.1 which requires the disclosure of oral agreements. A decision in favor of the application of the law in Louisiana undoubtedly will affect the interests of the United States although the issue arises in a suit between private individuals.

4. If state law be applicable, this case should be remanded to the Court of Appeals for a decision on

the merits of the litigation. The District Court adhered to an inability "to disregard technicalities" and held that the instruments limited the claims of McKenna and Pan American to the original acquired lands applications (R. 73) and if Wallis did breach his contracts, he may be answerable in damages⁵. (R. 70) The only issue decided by the Court of Appeals was that federal law applied. The Court did not interpret the Option Agreement. Nor did it determine whether specific performance could be granted under Article 2040 of the Civil Code and the decisions thereunder which the trial court ignored in rendering its decree. On rehearing the Court of Appeals again held that federal law governed the dispute without adjudicating the two issues posed by Pan American either of which is clearly dispositive of the litigation.

ARGUMENT

1. *Federal Law is Applicable*

The basic issue posed is whether the federal government has an interest herein arising out of the Mineral Leasing Act affecting "public domain land" which requires the application of federal law⁶.

⁵The Court below also stated: "Nor does it matter whether Wallis obtained his lease by breaching his trust as alleged" (R. 70) (and) In effect, Wallis had two irons in the same fire, in only one of which McKenna and Pan American held an interest. (R. 75)

⁶The Court below held "there is sufficient federal interest for the substantive independence of the federal court in determining the claims of McKenna and Pan American."

Wallis contends there is no "duty" upon the federal courts to invoke equity to properly vest the legal title to public lands and that federal courts apply federal law only to the review of matters which transpired or were initiated in the Land Department. The Solicitor General states that the Mineral Leasing Act "contains no provisions governing the private business relations of parties to oil and gas ventures and does not purport to impose on oil and gas entrepreneurs a duty to deal fairly with their partners or associates." (Memorandum for United States at p. 11) It is further suggested that "any unfairness by Wallis here occurred after he obtained the lease, when he refused to assign interests therein to McKenna and Pan American." (Memorandum for United States at p. 12 n. 9) However, the alleged fraud of Wallis was inceptive which differentiates this case from *McCulloch Oil Corporation of California*, No. A-30208, (November 25, 1964) cited by the Solicitor General. It began when Wallis first made the mental decision to circumvent his obligations to Pan American by filing the new applications with a corrected description for his personal account and continued uninterruptedly thereafter. Wallis not only refrained from diligently prosecuting the original acquired lands applications but actually effectuated their destruction. Of this there is no doubt. The fact that Wallis filed in the Land Department *an acquired lands application for his own account with the corrected description in the name of his brother-in-law, T. Miller Gordon, is controlling proof*. By lulling Pan American into a false sense of security, Pan American was deprived of specific knowledge to which it was entitled, to wit: that the original descriptions were defective. Pan American

accordingly was deprived of any opportunity to correct the erroneous description. Pan American was deprived of the right to file a Protest against Wallis himself in the Department of the Interior to establish Pan American's rights under the Option Agreement. Pan American could not have anticipated that Wallis would subsequently claim the lease in derogation of its fundamental rights under the Option Agreement. The fraud of Wallis conclusively prevented Pan American from asserting its rights in the Department of the Interior to the lease in dispute and to the T. Miller Gordon "acquired lands" application. Since the Land Department had no knowledge of the fraud of Wallis obviously it did not act improperly in granting the lease to Wallis, but at the time of issuance the lease which Wallis obtained was tainted with fraud with respect to his own actions in attempting surreptitiously to obtain it for his personal benefit.

Duplicity by an agent for selfish gain has been denounced universally in Christian jurisprudence since the Scriptures. The purity of the fiduciary relationship is a precept of morality untarnished by the Ages.

"No man can serve two masters; for either he will hate one, and love the other; or he will attach himself to one and think lightly of the other. You cannot be servants both of God and of money." Matthew 6:24; Luke 16:13.

The facts in *Massie v. Watts*, 6 Cranch 148 (1810), invite comparison with those in the instant suit. Both cases involve a fiduciary who attempted to take ad-

vantage for his personal gain of an error in the description of land he was obligated to obtain pursuant to his trust. Massie acted as a "locator." Wallis acted under the Option as an Applicant. Massie encountered difficulties respecting the location. Wallis encountered difficulties respecting the location also, the final description of which he was advised had to be "foolproof" to overcome the prior "vulnerable" descriptions in his own original "acquired lands" offers and the competitive Morgan offers. Massie, as agent, entered and surveyed a portion of the same land for himself. Wallis correctly described *the same land* for himself and simply filed new offers on the advice of counsel. Massie obtained a patent in his own name. Wallis obtained a mineral lease from the United States in his own name. The filing by Wallis of the "public lands" offer for himself coupled with the "hiding" and "sterilization" of the T. Miller Gordon offer in the name of his brother-in-law, plus the new "foolproof" description, all constitute a "withdrawal" — identical in effect with Massie's withdrawal — of the "acquired lands" offers.

The following are two illustrations:

1. If any lawyer accepted a retainer from a client to obtain an "acquired lands" lease and thereafter accepted a second retainer from another client to obtain a "public domain lands" lease or an "acquired lands" lease containing a foolproof description rather than the erroneous description in the original acquired lands applications on the same land, a disbarment proceeding would be in order.

2. It was the duty of Wallis (as held in *Massie v. Watts*, supra) as an agent and fiduciary and also under the Agreement itself to amend or correct the deficient description in the original "acquired lands" applications. Wallis was under a paramount duty to validate the "acquired lands" offers. Wallis could not take advantage, for his personal gain, of the knowledge of the faulty description which he acquired while so acting as an agent and fiduciary and under the Agreement. If this were possible, as Wallis contends, every lawyer who examines a title which he ascertains requires curative work would have the right to acquire the outstanding title for the lawyer's own benefit. In *Ringo v. Binns*, 10 Peters 269, the Court in 1836 held that if an agent discovers a defect in the title of his principal, he cannot misuse it to acquire title for himself.

The location of the public domain lands in Louisiana and the domicile of Wallis in Louisiana are purely incidental to the fundamental fact that it is the determination of ownership of a federal lease issued pursuant to federal activities in Washington, D. C. which is involved so that the uniform principles of federal law in this area of federal concern must be applied. It is submitted that the victim of Wallis' acts should not be deprived of the Option to obtain this federal lease simply because Wallis happens to reside in Louisiana.

Interstitial restrictions imposed by Louisiana may not decree who the federal government's lessee shall be and may not under any circumstances prohibit or interdict the transfer of federal leases. The judicial determination of the rights of Petitioner and Respond-

ent with respect to the ownership of the federal lease must be governed exclusively by a uniform rule of law which recognizes the equitable principle of resulting and constructive trusts. The principle is stated in the landmark decision of *Irvine v. Marshall, et al.*, 61 U.S. (20 How.) 558 (1858), cited by the Fifth Circuit Court of Appeals on pages 434-435 (344 F. 2d) of the opinion, and which approved *Massie*, *supra*.

Whether the United States is under a "duty" from a technical viewpoint to prevent fraud as between private litigants in this type case is not the question. *The issue is whether the United States has such "an interest" in the subject matter as to discourage false information and inceptive fraud in the processing of federal leases. Anyone guilty of deliberate wrongdoing in the Land Department should be deprived of the fruits of his perfidy. Only by this rule can the integrity and the sanctity of all dealings whatsoever within the Land Department itself be preserved.* Of course, the Mineral Leasing Act lacks an expressed statutory sanction for the pronouncement. However, in *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957) a similar situation — lack of an express statutory sanction — was presented. The language employed by the Court is clear and may be paraphrased as stating the rule to be as follows:

We conclude that the substantive law to apply in (aid of the uniform implementation and protection of federal interests under the Mineral Leasing Act) is federal law which the (Federal Courts) must fashion from the policy of our (Mineral Leasing Act in a suit involving private individuals) . . . The (Mineral Leasing

Act) expressly provides some substantive law. It points out what . . . may or may not (be done in certain situations). "Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem."

The "range of judicial inventiveness" in "fashioning a remedy" (application of the doctrine of constructive trusts) will effectuate the objectives of the Mineral Leasing Act.

The Solicitor General's position is that "as the facts of the present case illustrate, the issues involved in such dispute are the kind normally resolved as questions of private law." The word "normally" is inapplicable. This is not a normal case. Inceptive fraud of Wallis in the Land Department is involved here. This Court and the courts of the common law states have recognized constructive trusts based on inceptive fraud and it is difficult to comprehend why Pan American should be relegated to "private law" when the unique law of Louisiana is said not to recognize the constructive trust rule. While Pan American is entitled to ownership of the lease under Louisiana law, we submit that as a matter of policy a uniform rule of federal law that recognizes resulting trusts⁷ must

⁷The record in this case demonstrates beyond argument that Petitioner breached his trust and fiduciary obligations to Pan American. The opinion of the Fifth Circuit, underscored the holding in *Massie v. Watts*, 6 Cranch 148 (1810), that "Accord-

be applied to inceptive fraud of the type committed by Wallis in the Land Department. The fraud of Wallis was continuous from the moment he made the "public domain" offer for his own account and maneuvered the nullification of the original "acquired lands" applications.

The Mineral Leasing Act would be materially furthered if a uniform rule of federal common law is made applicable to inceptive fraud committed by a lease applicant BEFORE the issuance of a lease in such a situation. Any other rule would permit the Land Department to be used by an unscrupulous offeror as an instrumentality for fraud with respect to mineral leases which may be issued without an interested party having the opportunity to assert his rights.

2. *The Mineral Leasing Act for Public Domain Land*^a

The majority opinion specifically stated:

"The law applied should be keyed to the nature of the issue before the court; if nonfederal, state substantive law should be applied; if a federal matter is before the court, federal law should be applied."

ing to the clearest and best established principles of equity, the agent who so acts becomes a trustee for his principal. He cannot hold the land under an entry for himself, otherwise than a trustee for his principal." (Emphasis by Fifth Circuit Court of Appeals).

^aAct of February 25, 1920; Mineral Leasing Act of 1920; 41 Stat. 437; 30 U.S.C. 181 et seq.

"* * * federal issues in such cases will be decided by reference to federal law."

"The 'Erie doctrine' does not annul the federal courts' responsibility to develop federal common law in aid of the uniform implementation and protection of federal interests."

Petitioner contends that the second opinion of the Court of Appeals is erroneous because Section 32 of the Mineral Leasing Act "unqualifiedly precludes the 'federal courts' responsibility to develop federal common law in aid of the uniform implementation and protection of federal interest 'as respects the Leasing Act.'" (Brief for Petitioner at p. 31) Section 32 of the Act reads:

"The Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and do any and all things necessary to carry out and accomplish the purposes of sections 181-194, 201, 202-208, 211-214, 223-229, 241, 251 and 261-263 of this title, also to fix and determine the boundary lines of any structure, or oil or gas field, for the purposes thereof. Nothing in said sections shall be construed or held to affect the rights of the states or other local authority to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States. February 25, 1920, c.85, § 32, 41 Stat. 450."

Petitioner's argument based on the above section is

entirely erroneous and should be specifically rejected. Even the Solicitor General in his brief has apparently not subscribed to it.⁹

The dissenting opinion below concedes the power of a federal court to fashion federal common law herein:

"I do not say that the Court's decision is likely to start dangerous temblors in American federalism. It has always been in the cards that federal common law would expand as the activities of the national government expanded. For many years, before *Erie*, the federal 'judge followed his own nose'; he 'sat down and looked up what relevant federal law there might be in the cases and otherwise decided what the law ought to be * * * though in some instances the judge might consider relevant state decisions'. Moreover, I agree with Judge Henry Friendly's summary of the development, since *Erie*, of the 'new' federal common law: 'We may have not achieved the best of all possible worlds with respect to relationship between state and federal law. But the combination of *Erie* with *Clearfield* (*Clearfield Trust Co. v. United States*, 318 U.S. 363,

⁹"In these circumstances, we believe that the rights of the litigants may properly be left to determination under principles of State law unless the application of such principles would undermine some federal interest or policy — here, one drawn from the Mineral Leasing Act of 1920. See *Free v. Bland*, 369 U.S. 663; *Bank of America v. Parnell*, 352 U.S. 29; *Sola Electric Co. v. Jefferson Co.*, 317 U.S. 173; Note *The Competence of Federal Courts to Formulate Rules of Decision*, 77 Harv. L. Rev. 1084 (1964)." (Emphasis added)

63 S.Ct. 573, 87 L.Ed. 838) and *Lincoln Mills (Textile Workers of America v. Lincoln Mills of Alabama)*, 353 U.S. 448, 77 S. Ct. 912, 1 L.Ed. 2d 972) has brought us to a far, far better one than we have ever known before.' ” (344 F. 2d 442).

This Court's interpretation of several similar worded provisions contained in the Reclamation and Irrigation laws, the Boulder Canyon Project Act and the Water Power Act demonstrate that Section 32 of the Mineral Leasing Act does not ipso facto preclude the responsibility of the Federal Courts to implement and protect federal interests. The proviso in Section 32 is not unique or peculiar to the Mineral Leasing Act. In *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275 (1958) one of the main issues was whether the validity of the contracts involved was governed by Federal or State law in light of Section 8 of the Reclamation Act of 1902. The State's argument was that Section 8 nullified the right of the Secretary of the Interior to implement and effectuate natural reclamation policies. Section 8 of the Act, 43 U.S.C. 383 stipulated:

“Nothing in sections 372, 373, 381, 383, 391, 392, 411, 416, 419, 421, 431, 432, 434, 439, 461, 491 and 498 of this title shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of such sections, shall proceed in conformity with such laws, and nothing in

such sections shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof. June 17, 1902, c.1093, § 8, 32 Stat. 390."

Justice Clark, as organ for the unanimous Court, delivered the opinion:

"As we read §8, it merely requires the United States to comply with state law when, in the construction and operation of a reclamation project, it becomes necessary for it to acquire water rights or vested interests therein. But the acquisition of water rights must not be confused with the operation of federal projects."

"In light of these congressional actions, it cannot be said that Congress intended that §8 would, under the application of state law, make inapplicable the excess lands provisions of §5 of the Reclamation Act of 1902 to the Central Valley Project. That possibility is foreclosed by subsequent and continuing action by the Congress ever since the inception of the project. Such a record constitutes ratification of administrative construction, and confirmation and approval of the contracts.

Justice Clark, as the organ for the Court in *City of Fresno v. California*, 372 U.S. 267 (1963) again wrote:

"We agree entirely with the disposition of the Court of Appeals. Petitioner seems to say that §8 of the Reclamation Act of 1902, 32 Stat. 390, 43 USC § 383, requires compliance with California statutes relating to preferential rights of counties and watersheds of origin and to the priority of domestic over irrigation uses. However, §8 does not mean that state law may operate to prevent the United States from exercising the power of eminent domain to acquire the water rights of others."

In *Arizona v. California*, 373 U.S. 546 (1963), the litigation arose under the Boulder Canyon Project Act, a separate reclamation statute, 45 Stat. 1057 (1928), 43 U.S.C. § 617-617t (1958). Section 14 of the above Act, 45 Stat. 1065 (1928), 43 U.S.C. § 617m (1958) included by reference Section 8 of the Reclamation Act of 1902. In addition, Section 18, 45 Stat. 1065 (1928), 43 U.S.C. § 617q (1958) provided:

"Nothing herein shall be construed as interfering with such rights as the States had on December 21, 1928, either to the waters within their borders or to adopt such policies and enact such laws as they deem necessary with respect to the appropriation, control, and use of waters within their borders, except as modified by the Colorado River compact or other interstate agreement."

A literal reading of the provisions of the Act would seem to have precluded the injection of federal law. However, the Court held:

"Nor does § 18 of the Project Act require the Secretary to contract according to state law. That act was passed in the exercise of congressional power to control navigable water for purposes of flood control, navigation, power generation, and other objects, and is equally sustained by the power of Congress to promote the general welfare through projects for reclamation, irrigation, or other internal improvements. Section 18 merely preserves such rights as the States 'now' have, that is, such rights as they had at the time the Act was passed. While the States were generally free to exercise some jurisdiction over these waters before the Act was passed, this right was subject to the Federal Government's right to regulate and develop the river."

See also Justice Brennan's opinion in *Federal Power Commission v. Southern Cal. Edison Co.*, 376 U.S. 205 (1964).

In *First Iowa Hydro-Elec Cooperative v. Federal Power Commission*, 328 U.S. 152 (1946), the meaning of Section 27 of the Water Power Act, 41 Stat. 1077 (1920), 16 U.S.C. § 821 (1958), was at issue. This section provided:

"That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein."

The Court held:

"The effect of § 27, in protecting state laws from supersedure, is limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature. It therefore has primary, if not exclusive, reference to such proprietary rights. The phrase 'any vested right acquired therein' further emphasizes the application of the section to property rights."

The language of Section 32 of the Mineral Leasing Act that "Nothing in said sections shall be construed or held to affect the rights of the States . . . to exercise any rights which they may have" does not preclude the "federal courts' responsibility to develop federal common law in aid of the uniform implementation and protection of federal interests." This provision which Petitioner relies upon did not CREATE any rights in favor of the states. It did not RECOGNIZE any rights of the states. It specifically referred only to such "rights" which the States "may have". Further the language of Section 30 of the Mineral Leasing Act¹⁰ "That none of such provisions shall be in conflict with the laws of the State in which the leased property is situated" simply has reference to the provisions or stipulations of federal leases and does not annul "federal responsibility" which is of concern here. It is well established that a federal court can fashion federal common law when the rights, interests, duties or substantive policies of the United States are directly

¹⁰30 U.S.C. 187.

affected."¹¹ *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943); *Francis v. Southern Pacific Co.*, 333 U.S. 445 (1947); *Royal Indemnity Co. v. United States*, 313 U.S. 389 (1941); *National Metropolitan Bank v. United States*, 323 U.S. 454 (1944); *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173 (1942); *United States v. Standard Oil Company*, 332 U.S. 301 (1947); *Bank of American National Trust & Savings Ass'n. v. Parnell*, 352 U.S. 29 (1956); *Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448 (1957); *United States v. 93,970 acres of Land*, 360 U.S. 328 (1959); See also *United States v. Taylor*, 333 F. 2d 633 (1964); *Levitt v. Johnson*, 334 F. 2d 815 (1964); *American Pipe & Steel Co. v. Firestone Tire & Rubber Co.*, 149 F. 2d 872 (1945); 20 Am. Jur. 2d., Courts §208 at 543; 1 A Moore, Federal Practice 0.305 (3) at 3045, 3053 and 0.324, at 3759 (2d ed. 1961); Wright, Federal Courts, § 60 at 213 (1963); Federal Courts — Rules of Decision, 50 Va.L.Rev. 1236 (1964); Clark, State Law in the Federal Courts: The Brooding Omnipresence of *Erie v. Tompkins*, 55 Yale L.J. 267 at 284, 285 (1946); Exceptions to *Erie v. Tompkins*: The survival of Federal Common Law, 59 Harv. L. Rev. 966 (1946); Hart,

¹¹This basic principle was enunciated by the Fifth Circuit Court of Appeals in *Pan American Petroleum Corporation v. Wallis*, 344 F. 2d 432 at page 440 and is indisputable that: "In summary, when jurisdiction of the federal courts is based on diversity of citizenship, all nonfederal matters will be decided by applying the law of state in which the court is sitting while federal issues in such cases will be decided by reference to federal law. Where federal matters are involved, the specific language of valid federal statutes will control when applicable; where federal statutes do not clearly articulate the law to be applied, federal courts must fill the interstices; federal courts can do this by reference to federal or state law and the choice here depends on a number of different factors. The first question presented in the instant case is whether or not 'federal matters' are involved."

The Relations Between State and Federal Law, 54 Colum. L. Rev. 489, 509-15; 525-35 (1954); Mishkin, The Variousness of Federal Law: Competence and Discretion in the choice of National and State Rules for Decision, 105 U. Pa. L. Rev. 797 (1957); Friendly, in Praise of Erie — And of the new Federal Common Law 39 N.Y.U.L. Rev. 383, 422 (1964).

Federal Courts have always had the responsibility to effectuate the uniform implementation and protection of federal interests. It is not to be presumed that Congress ever intended that each of the several states would have, as Petitioner contends, the right to regulate, curtail or prohibit the effectiveness and consequences of the clearly comprehensive Mineral Leasing Act of 1920, as amended. "At the very least, effective Constitutionalism requires recognition of power in the federal courts to declare, as a matter of common law or 'judicial legislation', rules which may be necessary to fill in interstitially or otherwise effectuate the statutory pattern enacted in the large by Congress." Mishkin, *The Variousness of Federal Law*, supra, at page 800.

Petitioner also denies the "federal courts' responsibility to develop federal common law in aid of the uniform implementation and protection of federal interests as respects the Leasing Act" because the United States did not acquire legislative jurisdiction over this land.¹² However, it is wholly immaterial whether the

¹²"The State has not ceded jurisdiction over the lands in question, nor was jurisdiction reserved when the State was admitted into the Union (Cf. Act of Feb. 20, 1812), and, Act of Feb. 8, 1912), and when this proviso of Section 32 is considered in light of Article 1, Section 8, Clause 17 of the Constitution

State has or has not ceded legislative jurisdiction over the lands. The United States has the right, power, affirmative authority and duty to "protect its lands, to control their use and to prescribe in what manner others may acquire rights in them" [*Utah Power & Light Company v. United States*, 243 U.S. 389 (1917)] and this rule is controlling whether or not the federal rights involved arise from the United States' possession of legislative jurisdiction under Article 1, Section 8, Clause 17 of the Constitution. The status of public domain lands in the legislative jurisdiction sense is inconsequential. In no event can local state rules interfere and extend to any matter inconsistent with the plenary power of the United States. *McCullough v. Maryland*, 4 Wheat 316 (1819); *Fort Leavenworth R. R. v. Lowe*, 114 U.S. 525 (1885); *Camfield v. United States*, 167 U.S. 518 (1897); *Ohio v. Thomas*, 173 U.S. 276 (1899); *McKelvey v. United States*, 260 U.S. 353 (1922); *Hunt v. United States*, 278 U.S. 96 (1928).

The majority opinion that certain provisions of the Mineral Leasing Act of 1920 "leave no room for operation of any State law" is obviously not in conflict with Section 32 of the Act as Petitioner asserts, because as heretofore demonstrated, Section 32 refers only to rights which the State "may have" and this does not supersede, conflict with or preclude the application of federal law. It is indisputable that Section 32 of the Mineral Leasing Act was not intended to expand state authority over federal functions and the implementation thereof.

(Supra, p. 3), and, this Court's decision in *Wilson v. Cook*, 327 U.S. 474 (1945), and *Paul v. United States* 371 U.S. 245 (1963), the applicability of local law to these private transactions, simply cannot be denied." (Page 31 of Petitioner's brief)

3. *Boesche v. Udall*

Petitioner acknowledges and does not dispute this Court's decision in *Boesche v. Udall*, 373 U.S. 472 (1963) but asserts that *Boesche* was erroneously interpreted below.¹³

Petitioner continues to rely on *Pan American Petroleum Corporation v. Pierson*, 284 F. 2d 649 (1960), and the early case of *Witbeck v. Hardeman*, 51 F. 2d 450 (1931) and related decisions. However, the decision of this Court in *Boesche* definitely establishes the legal distinction between a patent and a mineral lease, and further contrasts a mineral lease from a mining claim. *Pierson* placed a patent and a mineral lease in the same category and to this extent *Boesche* overruled *Pierson*, and further overruled *Pierson* as to the lack of authority of the Secretary of the Interior to cancel a mineral lease administratively.

The holding in *Pierson* was cited in the original dissenting opinion as dispositive of the litigation on the question of applicable law. (R. 87, 88) The dissenting judge in his second opinion readily admitted that "The effect of this decision (*Pierson*) is uncertain, however, in view of *Boesche v. Udall* . . ." (R. 120 n. 12)

In the *Boesche* case, the Court stated:

"We think that no matter how the interest conveyed is denominated the true line of demar-

¹³The Court's reference to *Boesche v. Udall* is plain and unambiguous. It appears on pages 440 and 441 (344 F. 2d) of the opinion. (R. 111, 112, 113)

cation is whether as a result of the transaction "all authority or control" over the lands has passed from "the Executive Department", *Moore v. Robbins*, supra (96 U.S. at 533), or whether the Government continues to possess some measure of control over them."

"Unlike a land patent, which divests the Government of title, Congress under the Mineral Leasing Act of 1920 has not only reserved to the United States the fee interest in the leased land, but has also subjected the lease to exacting restrictions and continuing supervision by the Secretary."

* * *

"In short, a mineral lease does not give the lessee anything approaching the full ownership of a fee patentee, nor does it convey an unencumbered estate in the minerals."

The distinction between a patent and a mineral lease was delineated and affirmed in *Udall v. Tallman* 13 L.Ed. 616 (1965), which approved *Boesche*.

It is submitted that *Boesche* is conclusive authority for the rule that the government does have a continuing interest in a federal mineral lease on sovereignty land because in no sense does it divest itself of "all authority or control" therein upon issuance of the lease.

The Fifth Circuit Court of Appeals said:

"The posture of the instant case is interstitial.

The Secretary has granted a lease to Wallis. We deal with claims that are, in essence, an alleged "option" and an alleged "assignment", but which ultimately, must be approved by or registered with the Secretary. We think, therefore, that there is a sufficient federal interest for the substantive independence of the federal court in determining the claims of McKenna and Pan American."¹⁴

* * *

"* * * we are impressed by the fact that the Mineral Leasing Act of 1920 represents a comprehensive scheme of federal regulation."¹⁵

"It is clear that the Mineral Leasing Act recognizes the devices of "assignments" and "options" as concomitants to the public policy against monopoly of federally-owned mineral deposits and, on the other hand, the public policy towards development of our mineral resources and increasing our domestic reserves. We do not think the use of these devices as a part of the scheme of carrying forth

¹⁴*United States v. Standard Oil Company*, 332 U.S. 301 (1947).

¹⁵The language of this Court in the case of *Sola Electric Company v. Jefferson Electric Company*, 317 U.S. 173 (1942) is applicable herein: "* * * In such a case our decision is not controlled by *Erie R. Co. v. Tompkins*, 304 U.S. 64, 82 L.ed 1188, 58 S.Ct. 817, 114 ALR 1487. There we follow state laws because it was the law to be applied in the federal courts. But the doctrine of that case is inapplicable to those areas of judicial decisions within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they effect must be deemed governed by federal law having its source in those statutes, rather than by local law."

this public policy should be limited by interstitial restrictions imposed by the law of the State of Louisiana, which are not present in other states. In a word, we think this is an area for uniformity."¹⁶

4. Uniformity

Hodgson v. Federal Oil and Development Company, 274 U.S. 15 (1927), does not support Petitioner's conclusions, but demonstrates the correctness of the interpretation of that case by the Fifth Circuit, 344 F.2d 422, footnote 7. In *Hodgson*, the plaintiff attempted to impress a trust upon a federal mineral lease on land in Wyoming. The lease interest of the plaintiff was purchased at a different time from the vestiture of title in plaintiff's cotenants. The Court held: "* * * to support the view that in equity and in good conscience the Oil and Development Co. acted for the McMannus heirs in securing the existing lease, it would be necessary to allege definite facts (not mere conclusions) sufficient to show some fiduciary relationship between them. This has not been done, unless such a relationship necessarily arose because of cotenancy." The Court in *Hodgson*, then stated that the Plaintiff was forbidden as a cotenant from acquiring and asserting adverse

¹⁶"In our choice of the applicable federal rule, we have occasionally selected state law . . . But reasons which may make state law at times the appropriate federal rule are singularly inappropriate here. . . The application of state law even without the conflict of laws rule of the forum, would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of several states." (Emphasis added) *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943); See also *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917).

title because the interest of the plaintiff accrued at a different time, and thereby plaintiff was bound by the exception to the general rule concerning a breach of trust arising out of a cotenancy derivative from an identical source. The Fifth Circuit herein specifically interpreted *Hodgson* as applying the law of the several states involving a breach of trust, saying, "We read *Hodgson* as fashioning a federal law of fiduciary relationship by drawing on the law of several states."

Petitioner admits (p. 60) that in *Hodgson* "* * * the Court applied Federal law to the extent possible . . ." The opinion in *Hodgson* also shows that the common law of several states was applied. As the Court indicated, if the plaintiff had alleged "definite facts (not mere conclusions) to sufficiently show some fiduciary relationship between them", plaintiff would have had adequate ground for relief. *Hodgson* does not favor the Wallis position.

The Mineral Leasing Act is federal in scope. It is a comprehensive pattern intended by Congress to preempt the field of federal mineral leases. It is intended by Congress to foster federal policy. The federal common law is fashioned basically to effectuate the rights, duties and policies of the United States in a diversity action. Therefore, the extent and legal consequences of the paramount right of the United States to know the real lessee, sublessee or assignee constitute a substantive national "interest". Otherwise, the government's admitted public policy against "lease grabbing" would be frustrated through devices designed to circumvent this policy. True ownership of a federal lease affecting the public domain necessarily involves national interests. Such ownership is not such a local matter as

may be determined by a unique local law at variance with the laws of the several states. Even the dissenting opinion acknowledges the utter confusion that the local rule has produced in the legislature and the courts of Louisiana. In fact, the parol evidence rule is in direct conflict with 43 C.F.R. 3128.1 which requires the disclosure of oral agreements.

The dissenting opinion admits that under the Mineral Leasing Act the federal government is entitled to know the identity of its mineral lessee. Yet, if the dissenting opinion were otherwise followed to its logical conclusion, the federal government would be wholly deprived of this vital right affecting the national interests because UNDER LOUISIANA LAW, AS STATED BY THE DISSENTING OPINION, EVIDENCE COULD NOT BE HEARD TO DETERMINE THE UNDISCLOSED TRUE OWNER (LESSEE, SUBLESSEE OR ASSIGNEE) OF A FEDERAL LEASE. To recognize the sanctity of undisclosed ownership because of a unique rule in Louisiana would perhaps prevent the federal government from enforcing as to public domain land in Louisiana the provisions of the Mineral Leasing Act with respect to control of acreage under the monopoly provisions thereof¹⁷ and would place the government in the position at all times of NOT being able to ascertain the true lessee or assignee of a federal lease which affects national security — whether Louisiana law is applied to determine rights between private individuals or otherwise. This situation will

¹⁷30 U.S.C. 184; 30 U.S.C. 187 A; *U. S. v. Trinidad Coal and Coking Co.*, 137 U.S. 160, 166, 169 (1890); *Oil and Gas leases on United States Government Lands*, by Ross L. Malone, Jr., Second Annual Institute on Oil and Gas Law and Taxation, Southwestern Legal Foundation, at p. 315, 324 at n. 1.

prevail until a definitive decree on the issue is entered. A decision herein applying state law necessarily will affect rights and duties of the Secretary of the Interior in this litigation.

In addition, the nature of the rights and obligations created by federal leases would be affected by a myriad of uncertainties in the absence of a uniform law which provides a certain and definite guide to the rights of the parties, rather than subjecting them to the vagaries of the laws of many states. While the business of the United States may go on without uniformity, the policy of applying federal law to these transactions is of substantive interest and concern in establishing certainty and definiteness by having one set of rules governing the rights of all parties to federal mineral leases as contrasted to multiple rules.

The following language of the second dissenting opinion indicates that it stems from "fear" that the majority holding for uniformity will result in the cataclysmic juridical devastation of long established law which would create chaos with respect to property rights of the laws of several states:

"The holding of the Court carries alarming implications. If federal common law controls and the claimants hold an equitable title by virtue of a constructive trust, what is Mrs. Wallis's interest? Assuming that Wallis has a part interest as lessee, does his wife have half of his interest as her share in the community? Or is she a common law partner with him? Or does she have no interest in the lease? Are Wallis's children deprived of their legitime,

their forced portion of their father's estate, as to their father's interest in the lease? I hope my fears are all bloodless ghosts. But if a federal court, in the name of interstitial law-making, may concoct a Law of Property, Law of Contracts, Law of Restitution and, perhaps, a Law of Descent and Distribution for Mississippi Mud-Lumps, I foresee the fashioning of some fancy legal systems for a great many federal enclaves within the borders of the states." (344 F. 2d 444)

It is difficult to understand the "alarming implications" of the dissenting opinion because:

(a) The law of the land as expressed in *Hood v. McGehee*, 237 U.S. 611, 615 (1915) is uncontroverted that each state is sole mistress of the devolution of land by descent, and this principle embraces any real right the situs of which is in the particular state. The devolution of property is governed universally by local laws of descent and distribution which remain unaffected by the majority decision.

(b) As stated by the author of the dissenting opinion as the organ of the Court in *Akin v. Louisiana National Bank of Baton Rouge*, 322 F. 2d 749 (1963), "There are several reasons why a federal court has no jurisdiction to probate a will or to administer an estate".

The applicability of uniformity to federal leases obviously does not hinge on "alarming implications". Federal law governs the effectiveness and consequences of the Mineral Leasing Act including the own-

ership of the federal lease which is at issue in this litigation, while state law remains untouched to regulate descent and distribution.

5. *Issues Asserted on Merits of the Case by Pan American but not passed upon by the Court of Appeals*

The Option Agreement embraces the subsequently filed public domain application in light of paragraph II, (the omnibus clause) which stipulated:

"Wallis agrees to make diligent efforts to acquire leases on, to acquire the right to lease all lands described in the above referred to applications and to obtain the issuance of leases to him covering all of said lands." (R. 42)

In summary, Pan American's position is that "leases" on "all lands described in the above referred to applications" are covered specifically without reference to the "character" of the lands or the "form" on which Wallis was to obtain the leases. Pan American's agreement was, therefore, to acquire an option on leases to be obtained by Wallis on the specific lands. It was not an option to acquire FORMS. The Court of Appeals on rehearing noted that, "Pan American has petitioned for a rehearing limited to the interpretation of its claimed Option Agreement with Wallis . . ." (R. 108) The Court, however, did not determine whether the contract covered the land involved. This issue must be decided by the Court of Appeals regardless of the law that is to govern the case. Secondly, under Louisiana law — *dehors* the parol

evidence rule or the constructive trust doctrine — the ownership of the lease belongs to Pan American. Louisiana law does not permit Wallis to profit by his wrongdoing in sabotaging the acquired lands applications to prosecute his public domain application for personal profit. Both applications admittedly cover the identical land. (R. 69) The Option Agreement imposed on Wallis a duty to diligently prosecute the acquired lands applications. His obligation under the Option, separate and apart from his fiduciary relationship, requires him to restore to the coverage of the Option whatever he attempted to gain personally by his wrongful act in prosecuting the "public lands" offer to the utter exclusion of the "acquired lands" offers — by designedly entering into competition with his Optionee to defeat the purpose of the Option. The admitted acts of Wallis which destroyed the "acquired lands" applications are:

1. The use in "his" public lands offer of a "better" and "foolproof" description which connected the metes and bounds description of the unsurveyed lands with a corner of the public lands survey for his own account which the pending "acquired lands" offers under Option did not do.
2. The filing of an offer on the "public lands" form for his personal gain in direct competition with the pending "acquired lands" offers.
3. The filing of a Protest on March 26, 1956, in active prosecution of his "personal" public lands offer attacking only the Morgan public

lands offer and omitting consideration by the Bureau of the original acquired lands offers or the "new" offer on the acquired lands form secretly filed in the name of his brother-in-law, T. Miller Gordon.

4. The prosecution of his "personal" public lands offer to the complete exclusion of the acquired lands offers in the Bureau of Land Management, before the Secretary of the Interior, in the United States District Court for the District of Columbia, and in the United States Court of Appeals for the District of Columbia and in this Court in the *Morgan* case.

The decision of the Department of the Interior involving the lease issued to Wallis is noted in 65 I.D. 369, 372. It constitutes overpowering evidence that Wallis deliberately sabotaged the "acquired lands" offers. It also demonstrates the administrative ruling, subsequently approved by the courts, that although Wallis, and not Morgan, was entitled to a lease the ruling itself never actually constituted an adjudication on the basis of legal evidence that the subject acreage is "public" rather than "acquired". The Department of the Interior's decision reads:

"... Although all the parties are maintaining both types of offers, not one of them is insisting that the Director's determination is in error. For example, Wallis has not appealed from the Director's decision which rejected Morgan's public land offer and remanded his own public land offer for adjudication in accordance therewith."

That Wallis sabotaged any rights which Pan American had under the Option to acquire leases on the "acquired lands" form in order to validate his "personal" public domain offer is plainly evident from the decision of the United States Court of Appeals for the District of Columbia in the *Morgan* case (306 F. 2d 799, 800) which was rendered on July 5, 1962, wherein the court in affirming the decision of District Judge Hart, said:

"The Director of the Bureau of Land Management concluded that the lands in question were not and could not have been at any time "acquired lands," for the United States had never previously divested itself of title to the lands in issue, only thereafter to re-acquire them. Accordingly he ruled that the law and the regulations pertaining to *public* lands must control.

"Thereupon he gave Wallis and Morgan thirty days within which to show cause and to submit briefs and evidence with respect to that ruling. *Neither party responded.* The Director then ruled that his decision eliminating the "acquired lands" applications had become final, the offers thereunder were deemed finally rejected, and as to those applications, the case was closed.

"The Secretary also rejected the Morgan public land offer on the ground that Morgan had failed to connect the metes and bounds de-

scription of unsurveyed lands with a corner of the public lands surveys. He ruled additionally that the description in the Morgan application was insufficient under the applicable regulation to identify the land. It may be noted that the regulations also provide that an offer will be rejected and will confer no priority unless it be completed in accordance with the regulations."

It is accepted practice that whenever an applicant is in doubt as to the character of the land in question, he may file two applications to insure full consideration. Cf. *Seaton v. Texas Co.*, 256 F.2d 718. There is no law which permits Wallis to avoid his obligation under the Option to take advantage of the situation created for personal profit. An indisputable fact is that the success of Wallis in defeating the Morgan offer is attributable entirely to the curing by Wallis of the erroneous original description because "*there was no dispute before the bureau with respect to the character of the land.*" Morgan did not question the character of the land and Wallis elected not to do so to serve his selfish interest. The memorandum for Stewart L. Udall, Secretary of the Interior, No. 523, in opposition to the petition for a writ of certiorari in *Morgan v. Udall*, shows:

"To the extent that the lands in issue here are islands arising in the marginal sea, petitioners do not deny, and, therefore, we assume for purposes of this case, that the decisions of this Court in *United States v. California*, 332 U.S. 19, and *United States v. Louisiana*, 339 U.S. 699, are applicable to such islands."

It is general law¹⁸ that once Wallis decided to file new applications his clear duty was to notify and offer Pan American any lease which he might obtain under either offer regardless of the technical character of the land.

The "diligent efforts" of Wallis obviously were made to obtain his "personal" lease. Wallis then became not only an unfaithful servant but *in addition thereto* violated the express language of Paragraph II of the Option and *prevented* any possibility of Pan American acquiring a lease.

¹⁸"*Duty of Agent to Give Principal Notice of Facts Material to Agency.* — It is the duty of the agent to give to his principal reasonable and timely notice of every fact relating to the subject matter of the agency, coming to the knowledge of the agent while acting as such, and which it may fairly be deemed material for the principal to know for the protection or preservation of his interests.

This duty may take on a variety of forms. As has been already seen, the duty of loyalty to his principal may require that the agent shall disclose to his principal the existence of adverse interests, either in the agent, or in others whom he represents, which are inconsistent with the full and fair performance by the agent of his duty to his principal.

Loyalty to his trust, the first duty of the agent. — Loyalty to his trust is the first duty which the agent owes to his principal. Without it, the perfect relation cannot exist. Reliance upon the agent's integrity, fidelity and capacity is the moving consideration in the creation of all agencies; in some it is so much the inspiring spirit, that the law looks with jealous eyes upon the manner of their execution and condemns, not only as invalid as to the principal, but as repugnant to the public policy, everything which tends to destroy that reliance.

May not put himself in relations antagonistic to his principal. — It follows as a necessary conclusion from the principle last stated, that the agent must not put himself into such relations that his own interests or the interests of others whom he also represents become antagonistic to those of his principal. . ." Mechem on Agency, 2nd Ed., Vol. 1, Sections 1383, p. 993, 1188, p. 867; 1189; p. 867.

The District Judge erroneously tossed aside Paragraph II by saying "It merely imposes an additional duty, supplementing the fundamental obligation recited in the first paragraph." The District Court failed to say what the "additional duty" was. *The fact is the District Court did recognize that Paragraph II imposed a duty on Wallis.* That duty, even under the District Court's interpretation of the Option, was the obligation contracted by Wallis "to make diligent efforts to acquire leases," etc. on the land. The decision of the District Court is an incredible benediction of wrong doing which does violence to Louisiana law. *The Civil law condemns the action of a contracting party, WHETHER A FIDUCIARY OR NOT, in violating his contract to acquire rights in the subject matter thereof for his personal gain.* Under Louisiana law, Wallis could not compete for leases on the same land against Pan American.

The Civil Law on this subject is symbolized by Article 2040 of the Civil Code of Louisiana, which reads:

"The condition is considered as fulfilled, when the fulfillment of it has been prevented by the party bound to perform it."

The dissenting opinion in *Walls vs. Smith*, 3 La. 498, which dissenting opinion was later adopted by the Louisiana Supreme Court in *Onarato vs. Maestri*, 137 So. 67, 173 La. 375, established that under Article 2040 the condition is considered as accomplished when the debtor whose obligation depends on the condition, prevents the accomplishment of it. The decision is specific

that the law does not permit the party whose obligation depends on a condition to allege the non-performance of that condition in defense where it was through his fault that it was not performed. The rule is based on plain honesty and decency. No man can take advantage of his own wrong and the law has been careful to make a special application of this maxim to cases where conditions form a part of the contract. *Pothier On Obligations* #212.

In *George W. Garig Transfer, Inc. vs. Harris*, 75 So. 2d 28, 226 La. 117, the plaintiff brought suit to be declared owner of a Louisiana Public Service Commission certificate authorizing operation of a common carrier motor freight service. The facts, which were undisputed, established that the defendant agreed to sell the certificate for \$4,000.00 cash and that such amount was placed in escrow subject to the approval of the transfer by the Public Service Commission to be sought by a joint petition to such body. Subsequent to the filing of the joint petition defendant filed a written motion stating his desire to withdraw from the joint petition and to have the matter dismissed. The Commission ruled that the transfer would have been approved if defendant had not withdrawn from the application but that it was not within their power to prevent such withdrawal. The Supreme Court based its decision on the dissenting opinion in the *Walls* case, and held that because the condition of approval by the Commissioner had been prevented by the defendant, under Article 2040 of the Civil Code such condition must be considered as accomplished. Plaintiff was accordingly declared owner of the certificate. Again, in *Lloyd v. Dickson*, 40

So. 542, 116 La. 90, the Court based its reasoning on Article 2040 and said:

"If instead of standing loyally by their contract with plaintiff the defendants enter into a contract destructive of it, the condition, as a matter of course, can never be fulfilled; but it is perfectly plain that a party cannot get out of his contract in that manner."

See also *D'Avricourt vs. Seeger*, 125 So. 735, 169 La. 620, (1906) and *United Gas Public Service Co. vs. Christian*, 173 So. 174, 186 La. 689 (1937).

The case of *Welsh v. Wyatt*, (Second Circuit 1964) 164 So. 2d 393, rehearing denied May 28, 1964, writ to the Louisiana Supreme Court denied on June 30, 1964, is the last expression on the subject and is dispositive of the issue.

Plaintiff and Defendant entered into an agreement whereunder Plaintiff agreed to sell and Defendant agreed to buy *certain described real estate* within the State. The agreement contained the provision that it was subject to obtaining necessary zoning of the property and expressly stated "buyers are to have ninety days to obtain said zoning." Prior to the expiration of the 90 days, Plaintiff advised Defendant by letter that Defendant's application for the zoning change might not be approved within the ninety day period and that he was agreeable to extending the contract for another sixty days. Plaintiff requested that Defendant sign a copy of the letter and to return one copy to him. Following receipt of this letter Defendant did not sign as requested. Defendant subsequently advised

Plaintiff that he would not buy the property involved, and the suit for specific performance followed.

The Court stated that there was no doubt that the rezoning could have been secured timely, that Defendant was in default by preventing the fulfillment of the condition he was obligated to perform and that Defendant's refusal to purchase the property would not prevent Plaintiff from obtaining *specific performance*. The Court in reviewing the applicable law which is absolutely controlling in this case held:

"Also the Code provides that '(w)hen an obligation has been contracted on condition that an event shall happen within a limited time, the condition is considered as broken, when the time has expired without the event having taken place'. The condition is considered as fulfilled when the fulfillment of it has been prevented by the party bound to perform it." LSA-C.C. Arts. 2048, 2051, 2038 and 2040.

* * * *

"The above reference from our Civil Code and Planiol are ample authority to the effect that Myatt was in default when the ninety-day period ended and re-zoning had not been obtained except for the extension granted by Welsh. In granting the sixty-day extension, the act of Welsh was unilateral in character, neither requiring written consent nor any other action by Myatt, for at the time Myatt's obligation was in default and subject to the will of Welsh who gratuitously gave an exten-

sion within which Myatt could easily have accomplished the re-zoning."

Specific performance of the contract was granted as prayed for in the petition.

In *Garig* the Louisiana Supreme Court decreed OWNERSHIP of the certificate involved for violation of the sacred precept stated in Article 2040, and in *Welsh*, the Court decreed specific performance of a real estate contract of purchase for the identical reason. There is no Louisiana law to the contrary.

In sum, it is respectfully suggested to this Honorable Court that if *Erie* be controlling and Louisiana law governs the rights of the parties, this case should be remanded to the Court of Appeals for interpretation of the Option Agreement and the propriety under Louisiana law of a decree recognizing Pan American's ownership of the lease and specific performance of the Option Agreement. Otherwise, Pan American will have been denied an appeal to review the merits of the litigation under Louisiana law.

In *Bank of America v. Parnell*, 352 U.S. 29, (1956) this Court, in language peculiarly applicable here, held:

"This conclusion requires reversal of the judgments of the Court of Appeals but not reinstatement of the judgments of the District Court. The Court of Appeals did not originally consider all the points raised by respondents. Moreover, since the Court of Appeals misconceived the applicable law, it is for that court

to review the judgments of the District Court in the light of the controlling state law."

As the court of last resort in this country and thus the ultimate guardian of justice in this land, this Court has fostered and developed procedures calculated to serve the high purposes of expeditious disposition of litigation, the avoidance of multiplicity of suits, the elimination of delay and the establishment of the rights and obligations of litigants so as to eliminate uncertainty. This suit has been pending seven years (R. 32) but Pan American's rights under Louisiana law have not been adjudicated by the Court of Appeals. Pan American, therefore, respectfully submits that it is within the power and duty of this Court, if federal law does not control, to remand the case for a decision on the merits under the Louisiana law.

CONCLUSION

The opinion of the Fifth Circuit is eminently correct. It succinctly delineates the standards to be followed as announced in repeated decisions of this Court governing the application of federal law in a diversity action. The Opinion stands firm against any challenge. The rule set forth by the Court below creates no imbalance in the scale between federal and state relationships. For the reasons stated, it is submitted that the opinion and decree of the Court of Appeals be affirmed. In the alternative, it is submitted that the case should be remanded to the Court below to pass on the Option Agreement and Louisiana law without reference to

parol testimony or the common law doctrine of resulting or constructive trusts.

Respectfully submitted,

LLOYD J. COBB
MORRIS WRIGHT
METTERY I. SHERRY, JR.
902 Whitney Building
New Orleans, Louisiana

WILLIAM P. HARDEMAN
PERCY SANDEL
1016 St. Charles Avenue
New Orleans, Louisiana

Attorneys for Respondent,
Pan American Petroleum
Corporation

February, 1966

INDEX

	PAGE
I. THE YAZELL CASE.....	1
II. AMICUS CURIAE MEMO OF THE UNITED STATES	5
III. BRIEF FOR PATRICK A. McKENNA.....	8
A. McKenna's "Statement of the Case".....	8
1. Stare Decisis and the "Rule of Property" Demand Application of Federal Law	9
2. Uniformity demands Application of Fed- eral Law	23
3. The Choice of Law Demands It	25
4. Justice Demands It	25
5. Naught to the Contrary Exists in Erie	25
B. Section B of McKenna's Brief.....	26
IV. BRIEF FOR PAN AM.....	26
Pan Am's Opening Statement.....	28
"Statement of Case" by Pan Am.....	28
1. Federal Law is Applicable.....	30
2. The Mineral Leasing Act for Public Do- main Land	36
3. "Boesch v. Udall".....	39
4. "Uniformity"	39
5. "The Case Should be Remanded" — Pan Am and McKenna.....	44
V. CERTIFICATE OF SERVICE.....	47
Annex "A"—Analysis of Authorities Cited by the Court in Support of the Statement Quoted at Page 9 of McKenna's Brief	49
Annex "B"—Wallis' Reply to Pan Am's Charges of Fraud on the Part of Wallis, Based on Matters Beyond the Print- ed Record.....	57

CITATIONS

I. Cases	PAGE
Bagnell et al. v. Broderick, 38 U.S. (13 Pet.) 436	11, 15
Bank of America Trust & Savings Assoc. v. Parnell, 352 U.S. 29	20
Boesch v. Udall	19, 39
Bohall v. Dilla, 114 U.S. 47	11, 14, 18, 19, 30, 49
Bucher v. Bucher, 231 U.S. 157	53
Cameron v. Lane, 36 La. Ann. 716	65
Carr v. Fife, 156 U.S. 494	54
Felix v. Patrick, 145 U.S. 317	50
Francis v. Southern Pacific Co., 333 U.S. 445	24
Gibson v. Chouteau, 80 U.S. (13 Wall.) 92	11, 14, 49
Great No. R. Co. v. Hower, 236 U.S. 702	54
Hamilton v. Glassell, 57 F. 2d 1032	5
Hayes v. Muller, 245 La. 356, 158 So. 2d 191	40, 46
Hodgson v. Federal Oil & Development Co., 247 U.S. 15	12, 39
Hood v. McGehee, 237 U.S. 611	43
Holt v. Murphy, 207 U.S. 407	54
Irvine v. Marshall, 61 U.S. (20 How.) 558	6, 11, 15, 16, 17, 34, 52
Independent Coal & Coke Co. v. U. S., 274 U.S. 640	54
Johnson v. Towsley, 80 U.S. 72	11, 19
Kittridge v. Breaud, 4 Rob. 79, 39 Am. Dec. 512	18, 25
Marquez v. Frisbee, 101 U.S. 473	17
Massie v. Watts, 10 U.S. (6 Cranch) 148	11, 14, 15, 33
Morgan v. Udall, 306 F. 2d 799	12
Paul v. U. S., 371 U.S. 245	38
Radio Station WOW v. Johnson, 326 U.S. 120	3
Rector v. Gibbon, 111 U.S. 276	11
Ruddy v. Rossi, 248 U.S. 104	53
Simmons v. Ogle, 105 U.S. 271	54

CITATIONS—(Continued)

I. Cases—(Continued)	PAGE
Sparks v. Pierce, 115 U.S. 408.....	49
Steel v. St. Louis Smelting and Refining Co., 106 U.S. 447.....	11
St. Louis Smelting and Refining Co. v. Kemp, 104 U.S. 636.....	11
Udall v. Tallman, 380 U.S. 1.....	39
U. S. v. Burnison, 339 U.S. 87.....	44
U. S. v. Colorado Anthracite Co., 225 U.S. 219.....	51
U. S. v. Northern Pac. R.R., 248 U.S. 507.....	53, 54
U. S. v. Standard Oil Co., 332 U.S. 301.....	2
Utah v. U. S., 284 U.S. 534.....	54
U. S. v. Yazell, No. 10, Decided Jan. 17, 1966.....	1, 3, 21, 24, 35
Van Brocklin v. Tennessee, 117 U.S. 151.....	49
Whelan v. New Mexico Western Oil & Gas Co., 226 F. 2d 156.....	5
Widdicombe v. Childers, 124 U.S. 400.....	50
Wilcox v. Jackson, 38 U.S. (13 Peters) 498.....	11, 13
II. Statutes and Regulations	
Submerged Lands Act of 1953.....	10
43 C.F.R. 192.141.....	41
43 C.F.R. 3128.1.....	40, 41, 42, 43
24 Fed. Ry. 4630.....	41
38 U.S.C. 2106.....	45
Rule 9, Federal Rules of Civil Procedure.....	58
III. Text and Miscellaneous	
42 Am. Jur. Public Lands § 37.....	55
73 C.J.S. Public Lands § 209.....	53
Restatement of The Law, Agency 2d Ed., Vol. 1 American Law Institute.....	30, 31
Rule 26, Par. 2, Rules of U. S. Supreme Court.....	27
65 I.D. No. 9.....	65



IN THE
Supreme Court of the United States

OCTOBER TERM, 1965

No. 341

FLOYD A. WALLIS,

Petitioner,

versus

PAN AMERICAN PETROLEUM CORPORATION,
Respondent.

FLOYD A. WALLIS,

Petitioner,

versus

PATRICK A. McKENNA,

Respondent.

(Pan American Petroleum Corporation, Initially
A Co-Defendant With Wallis)

*On Writ of Certiorari to the United States Court of Appeals
for the Fifth Circuit.*

REPLY BRIEF OF WALLIS.

May It Please the Court:

Wallis has received the briefs on behalf of Respondents and desires to reply thereto. However, before doing so, Wallis would like to comment briefly upon this Court's recent decision (January 17, 1966) in *U. S. v. Yazell*, No. 10 (October Term, 1965), and, the memorandum of the Solicitor General, both of which occurred after the filing of Wallis' original brief.

I.

THE YAZELL CASE

In Wallis' petition for certiorari, we pointed out that despite this Court's decision in *U. S. v. Standard Oil Co.*, 332 U.S. 301 (1947), where the jurisprudence relative to the applicability of Federal law was reviewed and clarified, nevertheless there was continuing confusion, and the subject required further consideration and clarification. Fortunately this has been done in *Yazell*, and, therefore, no prior decision of this Court (or any of the plethora of commentaries), should be considered except in the light of *Yazell*.

First and foremost, this Court pointed out that "generalities as to the paramountcy of the federal interest do not lead inevitably" to the overriding of state law.

Second, this Court held that a contract (the subject matter of which relates to that which derives from a Federal statute) is still controlled by local law, absent "**direct legislation** or by appropriate authorization to an administrative agency **coupled with suitable implementing action by the agency**,"—this even in the instance, like *Yazell*, where the United States was a party to the contract.*

Third, this Court pointed out that there is no decision of this Court, where it "has devised and applied a federal principle of law superseding state law (which) involved an issue arising from **an individually negotiated contract**."

Fourth, there is no case by this Court, where it has devised and applied overriding Federal law to impose and enforce liability "on a person who, according to state law, was not competent to contract." In the case at bar, the

* All emphasis herein is supplied, unless otherwise noted, and solely for the sake of brevity the Honorable Solicitor General is hereinafter referred to solely as "Solicitor."

asserted contracts are not **competent** contracts under local law.

Finally, *Yazell* held that: "Both theory and the precedents * * * teach (a) **solicitude for state interests**, * * *. They should be overridden by the federal courts **only** where **clear and substantial** interests of the national government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied."

The controlling effect of these postulates are obvious and need no elaboration, as respects the issues here involved, particularly in light of the memo of the Solicitor. We point out, as respects the last pronouncement above noted, that the "state interests" under consideration were the "field of family and family-property arrangements," while the holding of the majority below is directed at overriding the local Statute of Frauds. In *Radio Station WOW v. Johnson*, 326 U.S. 120 (1944), this Court specifically recognized, as one such "state interest," the "State's power over fraud," as to which it held that "the principle of fair accommodation * * * should be observed." It is thus clear that the case at bar comes **squarely within** the above holding of the *Yazell* case. Therefore, this decisive question is presented by the case before the Court, to-wit: Will "clear and substantial interests of the national government * * * suffer major damage" as a result of the Trial Court's application of local law — the local Statute of Frauds — to the private contract here involved?

The quickest, and clearest, and most direct answer is a resounding "NO!", found in the memorandum filed by the Solicitor. But an even more decisive "NO!" is found in the answer to a further question, viz: What has been the result of almost 45 years of actual experience under

the Leasing Act? Again the Solicitor tells us (citing Land Department decisions) that it has been the administrative practice of the Secretary, (a) to apply local law to undisputed transactions involving transfers of Federal leases; and (b) to relegate disputed matters to local law and local forums. Wallis has cited an unbroken line of cases (by both the Land Department and the courts) showing that they have consistently applied **local law** to such matters. Where then has any "interest" of the national government suffered "damage," during this period, much less "damage" to "clear and substantial * * * interests"? Where is the evidence of such "damage"? Respondents point to no such evidence. But more important still, the majority below could not, and did not, **point to one scintilla of damage**. The majority below concluded (R. 113) that: " * * * there is a sufficient federal interest for the substantive independence of the federal court," and that "the interest of the United States is directly affected." But without pausing to question these conclusions, we point out that *Yazell*, **requires in addition**, that such "interests" (assuming they be "clear and substantial") "**SUFFER MAJOR DAMAGE.**" Far from showing where such "interests" have suffered or might suffer "damage," as a result of Judge Wright's decision herein, all the majority below could say (R. 114) was:

"We do not think the use [in the Leasing Act] of these devices [i.e. "assignments" and "options"] as a part of the scheme of carrying forth this public policy should be limited by interstitial restrictions imposed by the law of the State of Louisiana, **which are not present in the other states.**"

This is the extent to which the majority attempted to show "damage," **which is absolutely no showing whatsoever**. And it should be noted, that while the majority concluded "uniformity" was necessary, yet the foregoing state-

ment shows that objection **was not** made merely to local interstitial restrictions, but only those "not present in the other states," and thus the majority conclusively demonstrates that state imposed interstitial restrictions, are not, per se, harmful or damaging, for it **only objects** to those "not present in other states." And in its haste to override the Trial Court's application of the local Statute of Frauds, the Court **only assumed** that it was an "interstitial restriction" peculiar to Louisiana and "not present in other states." It did not even consider this precise question but only assumed it, even in the face of the citation to it of the decision by the Tenth Circuit in *Whelan v. New Mexico Western Oil & Gas Co.*, 226 F. 2d 156 (1955), which specifically applied the New Mexico Statute of Frauds, to an asserted interest in Federal Oil and gas leases, and in denying such asserted interest, the Court said, page 160:

" * * * There is no legislatively enacted domestic statute of frauds in New Mexico. The English statute of frauds is in force and effect in that state as a part of the common law."¹

The foregoing discloses a total lack of any demonstration of "damage" to any Federal interest, and *Yazell* is controlling of the issues here involved.

II.

AMICUS CURIAE MEMO OF THE UNITED STATES

In granting the writ, this Court invited the Solicitor General to express the views of the United States (R. 134). The response to this invitation unreservedly and without

¹ The Fifth Circuit in *Hamilton v. Glassell*, 57 F. 2d 1032, compared the Statute of Frauds of Louisiana with that of Texas, saying (p. 1033): "The Texas statute of frauds is worded like the English statute in defining its operation: * * * (and at p. 1034) We apply it (the Louisiana statute) the more readily since the same results would be reached under the law of Texas if the case had been brought there."

qualification supports the position of Wallis, the decision of District Judge Wright and that of dissenting Circuit Judge Wisdom. At the same time it demonstrates the error of the decision of the majority below. This it does, both as respects the analysis of the Mineral Leasing Act, as well as the repeated conclusions that the United States has no interest in this controversy between these private individuals. It conclusively demonstrates that the issues between these private individuals—under the scheme of the Leasing Act, is and properly should be, governed by **local law**. As Wallis has shown, the Solicitor's analysis and conclusions are entirely in accord: (1) with the interpretative administrative application of the Act by the Secretary, and (2) with the unbroken jurisprudence (except for the divided decision below) of the Courts, during the forty-odd years since the passage of the Leasing Act.

Specifically, and in addition to the foregoing, the Solicitor's response discloses the following: (1) there is no claim here of a violation of federal statute, regulation or order, and, the validity of the lease, as vested in Wallis, is not questioned,² pp. 7-8; (2) applicability of local law herein **will not** undermine any federal interest or policy, p. 8; (3) the case of *Irvine v. Marshall*, 61 U.S. (20 How.) 558, is inapplicable, p. 8; (4) the Secretary **has not** been empowered by Congress to **compel** assignments [or subleases], and he may **disapprove** an assignment or sublease **only** for two statutory reasons, pp. 9, 11; (5) applicability of local law herein will not undermine the Secretary's regulatory authority under the Act, p. 10; (6) the extent of the interest of the United States is in seeing that the leased property is exploited only by qualified persons in accordance with the provisions of the lease, and this interest will not be affected by this private litigation or the

² This conclusion brings these cases precisely within the rule of Yazell.

applicability of local law thereto, p. 10; (7) if Wallis prevails herein, the status of the lease is unaffected. Conversely, if respondents prevail, yet they obtain no rights **unless** the Secretary approves respondents' **capacity** to hold the lease, or an interest therein, thereby approving the transfer to respondents. Thus the interests of the United States are fully protected—it has no interest in the outcome of this suit or the law applied herein, pp. 10, 11; and (8) the Secretary's power over private agreements is directed at preventing control of leases by persons lacking the requisite qualification, and this power is not impaired by the applicability of local law to such private transactions, p. 12.

In short, the Solicitor's analysis of the Act discloses that as between the parties to these private transactions the **substantive effect** of an assignment or sublease—as a **contract**, is governed and controlled by local law. That as a **contract** in accordance with local law, its **operative effect** as respects the title to the lease, is suspended by, or contingent upon, the approval of the Secretary as required by Sec. 30 of the Act. Such required approval is based **solely** [Sec. 30(a)] upon the **capacity** of the assignee or sublessee **to take under the contract**, i.e. (1) does the assignee or sublessee come within the acreage limitation on permissible holdings, and, (2) has he furnished sufficient bond? All subject to **the obligation imposed** by the Leasing Act [Sec. 30(a)] that regardless of the terms and conditions of the contract, the assignee or sublessee **automatically becomes bound** by the lease obligations in favor of the United States, upon such approval, and, it is only as respects these obligations so imposed and automatically assumed, that Federal law applies.

III.

BRIEF FOR PATRICK A. McKENNA

The brief by Respondent McKenna can best be characterized as an effort to avoid the issues presented, while injecting irrelevant issues. Where the brief touches the periphery of the issues presented, it ignores authorities cited by Wallis and the arguments in connection therewith.

A.

McKenna's Statement Of The Case

McKenna opens his statement of the case by describing the relationship between him and Wallis, as that of "joint venture." While it is true that McKenna **alleged** in his complaint (R. 2) as a conclusion, that there was a "joint venture," yet his complaint further shows (R. 7, Art. IX) that this conclusion was **predicated** upon the letter agreement of December 27, 1954 (Exhibit A, R. 8), for he there alleged: " * * * Plaintiff contends that by virtue of the contrary contentions concerning the plaintiff's interest in Federal Lease BLM 042017, **as a result of the agreement between plaintiff and defendant, Wallis, dated December 27, 1954**, an actual and bona fide controversy exists between the plaintiff and the defendant, Wallis, as to whether or not the plaintiff has an undivided one-third (1/3) interest in Public Land Lease BLM 042017 covering the lands comprising 826.87 acres in Townships 24 and 25 South, Range 30 East, Louisiana Meridian, Plaquemines Parish, Louisiana, **and the rights of plaintiff and defendant, Wallis, under the aforesaid agreement, dated December 27, 1954**, can be determined only by declaratory judgment * * * ." Wallis denied there was a "joint venture," asserting that McKenna was his "agent" or "employee" (Art. 20, R. 18). The Trial Court did not deem it necessary to decide this issue, saying: "In view of the disposi-

tion here made, it is unnecessary to decide whether the agreement created a joint venture, or is more properly characterized as an agency coupled with an interest * * * " (R. 67, fn. 4), while at the same time the Trial Court held (R. 73) that the December 27, 1954 letter agreement: " * * * taken alone or illumined by parol evidence, **limit(s)** the claims of McKenna * * * to the acquired lands applications." Thus it is totally incorrect for McKenna to represent the relationship as that of "joint venture."

At page 3, McKenna refers to the execution of the option agreement by Wallis with Pan American (Exhibit P-1, R. 40) and complains that: "McKenna was not advised of this agreement until the issuance of the lease * * * ." Yet here again, the Trial Court held: "No question is raised as to Wallis' authority to **contract alone** with respect to such a lease in view of the stipulation in his agreement with McKenna that 'all dealings in connection with these leases shall be at [Wallis'] **sole** discretion and direction.'" (R. 67, fn. 5).

The foregoing are the more glaring distortions contained in McKenna's "Statement."

* * * * *

There is no need to consider McKenna's "Summary Of Argument" (pp. 7-8) for we will proceed to examine the argument itself; and in doing so, our refutation will follow McKenna's subheadings.

1. *Stare Decisis and the "Rule of Property" Demand (Application of Federal Law), McKenna, pp. 5-14.*

On page 5, McKenna states that the lands so leased by Wallis "according to the Department of the Interior, were

never within the physical confines of the State of Louisiana, and the jurisprudence of that state never attached." As a predicate for this statement, McKenna refers to the "opinion of June 7, 1956 (R. 83), (of) the Department of the Interior," which he states (fn. 6) the Court of Appeal quoted at R. 83-86. This, of course, is not true, for the opinion only quotes an extract from the Department's opinion.³

This absurd contention which McKenna now presents to the Court, should be contrasted with what McKenna stated to this Court in his opposition to the petition for certiorari where, in describing his agreement with Wallis, he said, p. 2: "An Agreement was reached, involving a certain tract of federal land in **Plaquemines Parish, Louisiana**, which provided * * *".⁴ This same contention was asserted in the Court of Appeal and expressly rejected, for the majority opinion below, in referring to the subject matter of the suit (R. 78) stated that the lease in question covered "826.27 acres of exceedingly rich 'mud lumps' at the mouth of the Mississippi River, in Plaquemines Parish, Louisiana." Furthermore, the very lease in question, which was issued and **approved** by the Department (and specifically upheld by the Director in his opinion of June 7, 1956), expressly described the property as being **located**

³ It is our understanding that the opinion is not reported, but is available to this Court through the Department of Interior. However, for the convenience of the court, we are filing with the Clerk a copy of the decision in its entirety. As the court will observe, the extract quoted by the Court of Appeal discloses on its face that it was speaking of the situation which prevailed *prior* to the passage of the Submerged Lands Act in 1953. Furthermore, the extract quoted by the court below, followed a section of the Director's opinion, wherein he considered the Submerged Lands Act, and therein he said: "The third grant of lands *within this area* is the Submerged Lands Act * * *"

⁴ In making his absurd contention McKenna would ignore the allegations of his own complaint, where he alleged (R. 2) in Article III, that the lands covered by the five acquired lands applications covered "in the aggregate 826.27 acres of land in Townships 24 and 25 South, Range 30 East, Louisiana Meridian, Plaquemines Parish, Louisiana", and, in Article IV (R.3), where he alleged the application for the lease BLM 042017 was prepared "covering the same lands."

in **Plaquemines Parish, Louisiana** (R. 57), and the particular description of the property on Exhibit A to the lease (R. 59) commences with this statement:

“Exhibit A—The land requested is unsurveyed and is **located in Plaquemines Parish, Louisiana * * ***”
This contention of McKenna, is entirely specious.

On pages 6-9, McKenna cites the cases of *Wilcox v. Jackson*, 38 U.S. (13 Peters) 498 (1839), *Gibson v. Chouteau*, 80 U.S. (13 Wall.) 92 (1871), *Massie v. Watts*, 10 U.S. (6 Cranch.) 148 (1810), *Bagnell et al v. Broderick*, 38 U.S. (13 Pet.) 436 (1839), and *Irvine v. Marshall*, 61 U.S. (20 How.) 558 (1856). Before discussing these cases in detail, we point out that McKenna, in citing these cases, completely fails to take note of certain well-recognized distinctions which render these cases inapplicable to the issues here involved, and, he further ignores later decisions by this Court, which decisions completely refute the interpretation McKenna would attempt to place upon the above cited cases. Furthermore, it should be noted that these are the cases cited and relied upon, in the main, by the majority below in its original opinion (R. 78). Yet the majority below (we submit) was forced to abandon that opinion (and such authorities) when, on rehearing, it said (R. 108): “We have concluded that our decision should be more closely tied to that [Mineral Leasing] Act,” and then the Court proceeded to recognize the doctrine of *Johnson v. Towsley*, 80 U.S. 72 (1871), *Rector v. Gibbon*, 111 U.S. 276, *Marquez v. Frisbie*, 101 U.S. 473 (1879), *St. Louis Smelting and Refining Co. v. Kemp*, 104 U.S. 636, *Steel v. St. Louis Smelting and Refining Co.*, 106 U.S. 447, *Bohall v. Dilla*, 114 U.S. 47 (1884),⁵ all to the effect that a Federal court of equity has no jurisdiction or power to impose an equitable trust upon a “legal title” issued by

⁵ C’td and discussed at page 48, et seq. of Wallis’ Brief.

the Land Department, unless the party asserting the equities, derived those equities from dealings had with the Land Department.⁶ The rule as announced in *Bohall* (p. 50) is as follows: "We do not think the claim of the defendant to the **equitable relief** he seeks can be sustained on the grounds stated in his answer or cross-complaint. **To charge the holder of the legal title to land under a patent of the United States, as a trustee of another, and to compel him to transfer the title, the claimant must present such a case as will show that he himself was entitled to the patent from the Government, and that, in consequence of erroneous rulings of the officers of the Land Department upon the law applicable to the facts found, it was refused to him.** It is not sufficient to show that there may have been error in adjudging the title to the patentee. **It must appear that by the law properly administered the title should have been awarded to the claimant * * *.**" When faced with this pronouncement, the majority completed its abandonment of its first opinion when it said (R. 108-109): "It should be noted that the actions before the district court, and before this Court on appeal, do not seek to overturn the decision of the Secretary awarding the lease to Wallis. McKenna and Pan American were not applicants who competed with Wallis before the Secretary * * *. If these actions were those of 'competing claimants,' the Secretary's decision would be subject to judicial review **only** if it were shown that he had acted arbitrarily or unreasonably or that his interpretation of what constitutes 'public lands' was erroneous as a matter of law. E.g., *Morgan v. Udall*, D.C. Cir. 1962, 306 F. 2d 799."

Aside from the foregoing, the principal distinction which McKenna fails to note, is the fact that while a local

⁶ The doctrine of these cases was specifically applied to a Federal oil and gas lease in *Hodgson v. Federal Oil & Development Co.*, 247 U.S. 15 (1927), cited and discussed in Wallis' Brief, at pages 57, et seq., cf. particularly page 59, fn. 60.

statute may not operate **directly** upon the **title** to Federal lands or rights therein or thereto, nor may it purport to vest same, yet local law may and does regulate and govern **contracts between private individuals**, even though the contracts themselves purport to relate to such lands or interests therein, so long as the application of local law to such contracts, does not render the "legal title" a nullity when it is issued by the Land Department. Cf. *Marquez v. Frisbie, supra*. Thus local law does not operate **directly** upon the land or title thereto, but only upon the contract.

Further, McKenna ignores and refuses to recognize, that the Land Department has granted Wallis the legal title to a lease, although at page 13 he is willing to speak of "McKenna's interest in the lease." Yet (as noted at page 23 of Wallis' Brief), the Land Department has consistently interpreted the Leasing Act, to the effect, that a Federal lease vests the lessee "with a property right and estate for years in real property," "an immediate leasehold interest,"—"an interest in the land."⁷ Finally, McKenna would ignore the fact that this case is not concerned with the **power** of Congress (or the United States) to dispose of Federal lands, nor, is it concerned with the **disposition** of Federal lands or leases by the United States. We are here concerned **only** with a Federal oil and gas lease, and the United States **disposed** of said lease to Wallis.

As respects the extract quoted at page 6 from *Wilcox v. Jackson, supra*, we approve thereto, and, in fact, Wallis cited it in his brief. Here the **title to the lease** has been granted by the United States to Wallis, and such title, having passed to him, "like all other property in the state, is subject to the state legislation." This extract from *Wilcox*, was quoted by the majority below, and it followed (R. 80)

⁷ In Wallis' Brief, at page 56, et seq., we noted and discussed the decisions of this Court and the Courts of Appeal to the same effect.

with this conclusion: "Subsequent decisions have made it clear that 'title' as used in that principle includes **not only the legal title, but also the equitable title**, indeed, the entire bundle of rights going to make up ownership. Whether the lease from the United States to Wallis was **in part for the benefit** of McKenna or of Pan American, or of both, are questions to be determined by federal law." The patent error in this conclusion, is conclusively demonstrated by the extract above quoted from *Bohall v. Dilla*, that the only "equitable rights" which a federal court may take cognizance of, are those which originate with dealings had with the Land Department. Hence, when the rule of *Wilcox* is considered in light of *Bohall*, it is quite apparent that when the lease issued to Wallis, it became "subject to the state legislation," "like all other property in the state."

Gibson v. Chouteau, *supra*, was a case where a state statute attempted to operate **directly** upon the title to Federal land, and stands for the simple proposition that adverse possession based upon a state statute of limitations, cannot operate to divest the United States of title to its lands. It was **not** a case of local law operating upon or governing a private contract made with one who had **acquired** a right or title from the United States. When the decision in *Gibson* is examined in detail, it will be seen that rather than supporting the majority opinion below, in actuality, it supports the position of Wallis, when it is considered in light of its first submission to the Court, as reported at 75 U.S. (8 Wall.) 314. This was not a case of a private contract or transaction between private parties, which purported to relate to such public lands. Clearly, a state statute alone cannot give a person an inceptive claim or title to land when coupled only with adverse possession, where the legal title to such land is in the United States.

Massie v. Watts, *supra*, is absolutely irrelevant to the

issue here involved, and, in fact, has absolutely no relevancy to the position which McKenna is attempting to maintain. This fact demonstrates the error of the Court in *Irvine v. Marshall, supra*, which cited and relied upon *Massie*. For in *Massie*, (1) the Court was not concerned with any question of applicable federal law, as respects federal lands, for the lands involved in *Massie* were lands which the State of Virginia had owned, and, in turn, had disposed of; (2) the Court was **only** concerned with its **equitable jurisdiction**, from the standpoint of whether a federal court could render an *in personam* judgment requiring a conveyance of land, which was situated **outside** the jurisdiction of such court, and, **we repeat**, there was absolutely no question of federal law applying to the "title" question involved, and (3) the Court was solely concerned with **conflicting grants** of land by the State of Virginia, and **it therefore was impossible** for it to have been dealing with a situation where the legal title was still in the Land Department, for the United States **never** owned the land!

The case of *Bagnell, et al v. Broderick, supra*, is not applicable here, for the "equitable rights" involved in that case were derived from dealings had with the officials of the Land Department. Thus **both parties** were claiming under conflicting locations for the same property. The defendant had possession of the property, but the location under which the plaintiff claimed had already proceeded to patent. The suit was an **action at law** for ejectment, and the lower court held for the plaintiff, ruling that in an action at law, a patent was conclusive and must prevail. In affirming, the Court held that a mere "notice of location" under which the defendant held, was not sufficient under Federal land laws to constitute an "appropriation" of the land, since it was not followed by "the plat and certificate of survey, returned to the recorder of land-titles." Such being necessary for an "appropriation" under Fed-

eral land laws, local law could not make a mere "notice of location" operate as an "appropriation." And particularly, it could not make it equal to, or prevail over, a patent, which by the land laws was conclusive evidence of title. As respects any claims which the defendant might have under his "location," and particularly the "equities" in connection therewith, the Court said that if he could show the patent issued by "mistake" of the land officials, "then the equity side of the circuit court is the proper forum, and a bill the proper remedy, to investigate the equities of the parties." There is nothing in this case, which is relevant to the questions here involved.

As respects the case of *Irvine v. Marshall and Barton*, *supra*, Wallis discussed this decision in his brief in the context of later decisions, and demonstrated its inapplicability at pages 51 and 52 thereof, and, the Solicitor's Memorandum at page 8 also demonstrates its inappropriateness. McKenna, at page 10, states that Wallis attempts to distinguish *Irvine* "on two bases: First, that title had not passed from the United States; and second, that the cause of action did not accrue until Wallis' refusal to convey." This is a complete distortion of Wallis' distinctionment of that case, and a complete disregard of the full thrust of Wallis' position in this respect. At no time has Wallis argued that his "refusal to convey" has any relevancy to or connection with the *Irvine* case. As respects the fact that in the *Irvine* case, "title had not passed from the United States," Wallis' position is that the local statute involved in *Irvine*, as the Court interpreted it, was not a mere Statute of Frauds regulating a private contract, but was a statute which attempted to **vest title** irrevocably, for it provided (as quoted by McKenna, top of page 8) that "**the title and possession shall vest exclusively** in the **person named** as the alienee in such conveyance or agreement." Clearly, this a local statute cannot do, where the

title to the property is still in the United States, and, necessarily, it could not control the officials of the Land Department when they came to dispose of the "legal title" thereto, nor render that "title" a nullity when issued. This is the purport of the extract quoted by McKenna at the bottom of page 8, where the Court answered the question posed by it, concerning the power of the Territory "to impose and to dictate to the United States to whom, and in what mode, and by what title, the public lands shall be conveyed?" But this question is not involved in the case at bar, for here the United States **has disposed** of the lease to Wallis, and there is only a question of the law applicable to private contracts had with Wallis. Local law as here applied by the Trial Court has not said how or to whom the Land Department disposed of the lease, but local law gives full recognition to the Land Department's disposition thereof.

The *Irvine* case, at page 561 (61 U.S.) makes this statement: "The position asserted by the Court of Minnesota, **in interpreting their Statute**, must be understood **as broadly as it has just been stated**, OR IT HAS NO APPLICATION TO THE CASE BEFORE US * * *." We are forced to ask the precise meaning of this statement by the Court? It is quite obvious from a reading of the decision, that the Court concluded that the statute had been interpreted by the Courts of Minnesota as applying to the "title" of the property, while that title was still vested in the United States. We reiterate, that subsequent decisions by this Court, cited and discussed by Wallis in his brief, place *Irvine* in proper focus, and that it has no application to the case at bar, cf. *Marquez v. Frisbie*, *supra*.

At page 9, McKenna quotes an extract from the original majority opinion, to the effect that "as to the original patent, lease or other grant from the United States, fed-

eral law controls in determining title in its broadest sense, including strictly legal title, trust rights and any and all equitable or beneficial interests." The numerous authorities cited by the majority in support of this conclusion provide absolutely no basis therefor.⁸ Nor do these authorities support the majority's interpretation of the *Irvine* case. In making this statement and citing these authorities, the majority (1) failed to make a distinction between a local statute which purports to **directly** affect title to public lands and a statute that affects a private contract, and (2) it failed to observe the limited area wherein a Federal Court of equity might apply Federal law to impose an equitable trust on a "legal title" issued by the United States, as delineated in *Johnson v. Towsley*, *supra*, and the cases following the doctrine of that case. Such cases require that the asserted "equities" originate with dealings had with the Land Department. As above noted, the majority abandoned this position, when faced with the rule as announced in *Bohall v. Dilla*, *supra*.

On page 9, McKenna cites the Louisiana decision in *Kittridge v. Breaud*, 4 Rob. 79, 39 Am. Dec. 512 (1843), as though it were applicable to the case at bar, and, as though the Trial Court had apparently erred in failing to follow it. The facts show that it was a suit involving conflicting rights **acquired** by both parties under the **Federal Land Laws**, to the same property. Whereas the patent had issued to the defendant, the facts disclose that the plaintiff's ancestors-in-title were entitled, under the appropriate Act of Congress, to acquire the land, and that they had taken all steps necessary under the statute to acquire same, including the payment therefor. The only

⁸ Before the Court of Appeal, on application for rehearing, Wallis laboriously examined these authorities in detail. Because the majority abandoned this position in its second opinion, we will not burden this brief, at this point, with a repetition of this analysis. However, such an analysis has been annexed to this brief, *infra*, p. 49, as Annex "A."

reason they had not received adequate title thereto, was due to the failure of the U. S. Surveyor to show the claim upon the township plat, when he surveyed the township. The Court noted that, in Louisiana courts, no distinction existed between the law "side" and equity "side" of the court. It proceeded to examine the "equities" of the plaintiff originating in dealings had with the Land Department, and concluded that under the Federal Land Laws, the plaintiff's claim to the land was superior to, and originated prior to, those of the defendant. Hence **under Federal law** the plaintiff should prevail. This is simply a case of a State court's applying Federal law, and recognizing rights acquired under Federal law, all in accordance with Federal law. It is a classic example of the cases following *Johnson v. Towsley, supra*, and *Bohall v. Dilla, supra*, and is in no way analogous to the case at bar.

At the bottom of page 10, McKenna quotes an extract from *Boesche v. Udall*, and this he does in complete disregard of the fact (1) that this Court expressly circumscribed the effect of the holding in that case, (2) that the Court was speaking in a context contemplating the jurisdiction of the Secretary of the Interior **solely** from the standpoint of his authority to cancel a lease issued by him, and, for a pre-lease error in administration, (3) that the Secretary was a party involved, and a party at interest, and (4) that as respects disputes between private individuals, involving "rights" to public lands, where the "legal title" remains vested in the United States, the policy of Congress has been to leave the parties to local law and local forums.⁹ These are matters which McKenna completely ignores.

At the top of page 11 to the middle of 14, McKenna

⁹ The memo of the Solicitor shows that this has been the policy followed by the Secretary, in his administrative interpretation, and, application of the Leasing Act, since the inception thereof.

presents an analysis of the Leasing Act, and arrives at certain conclusions, about which we make these observations, viz: (1) The conclusions are contrary to those of the Solicitor, who likewise analyzed the Act and demonstrated that the matters here involved are completely beyond the legislative scheme, and, ambit of the Act; (2) McKenna's analysis of the Act, forces him to concede: (a) there is no specific provision of the Act which is applicable, and (b) there is not involved any rule or regulation of the Secretary of Interior or other implementing action of his agency, the Land Department—all as the Solicitor noted; (3) In the final analysis, McKenna resorts to the rhetorical arguments of "comprehensiveness," "overriding federal interests" and "uniformity," which alone mean nothing, for as this Court said in *Yazell*, "**generalities** as to the paramountcy of the federal interest do not lead inevitably to the" overriding of a state rule; (4) As has been pointed out by Wallis, and the Solicitor concurs,—we have had almost 45 years of **actual administrative application** of the Act by the Secretary, and, the same application by the Courts, all treating the matters such as here involved, as local, and subject to local law—thus 45 years when such matters have **not** received the "uniform treatment" contended for by Respondents. And we are forced to ask—what federal interest has suffered, and, do Respondents point to a single instance where any federal interest has suffered? Neither the majority nor respondents have so pointed. The Solicitor flatly stated there was no federal interest involved, and (5) As this Court stated in *Yazell*: "None of the cases in which this Court has devised and applied a federal principle of law superseding state law involved an issue arising from an individually negotiated contract." We submit that when this is considered in light of this Court's decision in *Bank of America Trust & Savings Assn. v. Parnell*, 352 U.S. 29, it demonstrates con-

clusively that any rights which these Respondents might have, arise solely from contract, and are entirely devoid of any Federal flavor.

In *Yazell*, even as respects a contract to which the United States was a party, this Court rejected "out-of-hand," the contention that "the unlimited right of the Federal Government to choose the persons with whom it will contract" warranted the overriding of local law. These Respondents occupy a **more remote** position, as respects such a contention, yet at the top of page 11 McKenna so contends, when he says that the Leasing Act "is entirely federal in scope and can in no way tolerate the interdiction by state law as to who can or cannot, or who may or may not, qualify to participate in an interest in the leasehold." But even in making this statement, McKenna never points out wherein, as respects this litigation, local law would so operate to the detriment of the Federal interest. Here McKenna has sued Wallis, a resident of Louisiana, asking that Wallis be required to recognize that he, McKenna, has an interest in a lease which he admits the United States properly issued to Wallis. McKenna does not predicate his suit on any provision of the Leasing Act, or regulation thereunder, but he predicates it **solely** upon a private contract with Wallis. He does not point to a single "right" which the Leasing Act granted him, and which has been denied. With the lease vested in Wallis, McKenna could only acquire a "right" thereto, with the consent of Wallis, the owner, and then only by a valid contract evidencing Wallis' consent. It is only as respects the question of whether the private contract so validly evidences Wallis' consent, that local law has spoken. As respects any "right" concerning a transfer of the lease, the sole grant by the Leasing Act is the privilege in favor of Wallis, as lessee, that he may assign or sublease. But this does not grant McKenna any "right," particularly a

"right" to acquire, for McKenna could only derive a "right" to acquire from Wallis, and, not from any provision of the Act. Thus local law has not interdicted, denied, or negated any provision of the Leasing Act, for all that it has done, is determine whether or not Wallis had evidenced his "consent" that McKenna so acquire, by executing a valid contract.

Hence when McKenna concludes, p. 13, that "the fee interest in the lands covered by the lease remains in the federal government whose involvement in the lease is continuing from its issuance until its termination or abandonment," he speaks of matters which involve **solely** and **only** the Federal Government, and which are of sole concern to it, and if any such matters were here involved (the Solicitor says they are not), the Secretary would be the proper party to assert and protect those interests. But in the final analysis the Congress has provided the precise extent and manner in which, and how, such Federal interests are to be protected, by enacting Sec. 30 and Sec. 30(a) of the Act. Additionally, Congress has conferred authority upon the Secretary to supplement these Sections by appropriate regulations. Thus there is no nexus justifying McKenna's a *fortiori* conclusion, that his "interest in the lease must be determined by federal law."

At the bottom of page 13, McKenna argues "the rule of property," and as will be noted, Wallis, in his brief, also argued for "the stability of titles." Thus there is no disagreement on the desirability thereof. Wallis has examined at great length, that which McKenna advances as a "rule of property," and demonstrated wherein it has no applicability to the facts of this case. On the other hand, McKenna nowhere assumes to even examine that which Wallis advances as a "rule of property,"—that which the Solicitor agrees is the applicable rule.

2. Uniformity Demands (Application Of Federal Law), McKenna pp. 14-21.

Under the guise of "uniformity" McKenna would here attempt to argue that which was characterized in *Yazell* as "paramountcy of the federal interest," and at page 15 this statement appears: "Allowing the interstices of such a program to be filled by the variables and contradictions which may, and oftentimes do, characterize the policies and procedures when moving from one state to the next may threaten the free flow of implementation which thus far has proved a marked success * * * ." We leave to this Court the task of attributing any responsible meaning to the totality of this jumble of words, while we only cope with the last phrase thereof, which indicates that up to the present time, something (which we assume to be the operation of the leasing program) "thus far has proved a marked success." And in this connection, we can only reiterate, that as respects matters such as those here involved, the Secretary in his administration, and, application of the Act (since its inception to date), has relegated these matters to local law, and, the Courts in applying the Act have also followed local law. All of this, McKenna concedes, has resulted in a "marked success,"—thus clearly refuting his argument that his "uniformity" is "demanded."

At the middle of page 16, McKenna, in different words, again reiterates his argument that appears at the top of page 11 dealing with the word "qualify"—and we there disposed of it. However, we add this one further thought, viz: McKenna speaks of "the form of one's agreement did not qualify (him) to receive an interest" in the lease, because the "form of (the) agreement" did not meet the requirements of local law. Hence he asks this Court to fashion overriding Federal law, and thus make Wallis

liable to convey an interest in the lease to him. Yet *Yazell* says no case by this Court permits "federal imposition and enforcement of liability on a person who, according to state law, was not competent to contract." We submit there is less reason to so enforce liability on Wallis (1) when local law says there is not even a **competent contract**, and (2) local law says even though there was the contract for which McKenna contends, yet local law, while affording an adequate remedy for the breach thereof, would not afford McKenna the remedy which he asks this Court to require (contrary to the remedy afforded by local law).

Sola (top of page 17) involved the **prohibition** of a Federal statute, which is not the case here, for both the majority below, and McKenna, conceded that the matter here involved is interstitial at the most.

At page 17 over to page 20, McKenna cites various cases, which he characterizes as "unrelated in their general facts," and he might have given even more bases for their distinguishment and inapplicability. But since this Court in *Yazell* stated that there was no case of this Court which "has devised and applied a federal principle of law superseding state law (which) involved an issue arising from an individually negotiated contract," and since the Solicitor's brief mentions the decisions which are relevant here, we do not deem it necessary to pursue these cases. We note, however, that of such cases, only *Francis v. Southern Pacific Co.*, 333 U.S. 445, was cited by the majority below, and Wallis dealt with that in his original brief.

The argument made in the first full paragraph on page 20, apparently prevailed in the celebrated case of *Swift v. Tyson*, and continued while that case was the law, but it was "laid to rest" by the equally celebrated case of *Erie R. Co. v. Tompkins*, and we do not believe the issues require us to point out why *Erie* is **not** "pure sophistry."

3. *The Choice of Law Demands It, McKenna p. 21.*

This argument revolves around the Louisiana decision in *Kittridge v. Breaud*, *supra*, which we have heretofore examined in detail, and demonstrated that there the Court did not exercise any power of "choice of law." On the contrary, the Court was dealing with "rights" which the plaintiff had acquired by virtue of the Acts of Congress, and, therefore, it **had no** "choice," but was **required** to apply Federal law, and, in effect "sit" as a Federal court. Here the situation is reversed, for McKenna acquired no "rights" by virtue of any Federal statute, and under the doctrine of *Erie*, the Federal court is required to "sit" as a state court.

4. *Justice Demands It, McKenna pp. 21-22.*

The content of this "argument" clearly demonstrates precisely what "justice" means to this Respondent. He boldly asks this Court to utterly disregard the law, and give him a judgment—not justice. This he advances in a Court of Equity, and even without pretense, or effort to demonstrate, that the laws which he asks this Court to disregard, would deny him the justice which he pretends to seek.

5. *Naught To The Contrary Exists In Erie, McKenna pp. 22-23.*

Under this argument, McKenna asserts that the lands here involved "are part of the marginal sea," and, are "not in the confines of any state." We demonstrated the error of this statement at the outset. This "argument," stripped of pretense, is a request that this Court repudiate the Rules of Decision Act, and the decision in *Erie*. This is an argument for "forum-shopping" in reverse, in that

McKenna would ask this Court to do his "shopping" for him, by bringing (what he asserts to be) the law of the District of Columbia, to Louisiana, and directing that it be there dispensed.

Section B, McKenna's Brief, pp. 23-24.

This section of McKenna's brief is devoted to the type of decree which this Court should enter, in the event of reversal, and, since it is common to the argument in Pan Am's brief on the same subject, we will consider both arguments together, and, at the conclusion of a consideration of Pan Am's brief.

IV.

BRIEF FOR PAN AM

Before considering the content of Pan Am's brief, Wallis feels required to call the Court's attention, to the question of whether the brief conforms to the requirements of the Rules of this Court, particularly from the standpoint of the repeated instances where the brief goes beyond the Record.

While this matter was pending on petition for certiorari, and in his reply brief in connection therewith, Wallis said, at page 5: " * * * Accordingly, in preparing the petition for certiorari, and more particularly the 'Statement Of Case,' Wallis attempted to comply with the requirements of the Rules of this Court, and confine such statement to a recitation of such facts as would properly present the question presented for review. In doing so, Wallis attempted to confine the factual recitation to those factual matters decided and ruled upon by the Trial Court, avoiding factual issues not passed upon by the Trial Court, or, confining it to facts about which there was no dispute. While neither of the briefs in opposition makes any spe-

cific objection to Wallis' 'Statement Of Case,' yet both briefs purport to give a 'Statement Of Case.' * * * Neither of respondent's 'statement' suggest any inaccuracy in Wallis' 'Statement,' and nothing contained in either such 'statement' supplies any 'omission' relevant to the questions presented for review * * * ." In the light of the foregoing, and upon the granting of the writ, when it came time for Wallis to designate the record, he did so with the view in mind of employing the same "Statement of Case" as that in his petition, since it had not been challenged by Respondents. After the designation of the record by Wallis, and the service thereof upon Respondents, neither Respondent filed any cross-designation, and Rule 26, par. 2, of this Court's Rules provides that if a Respondent does not so cross-designate, "he shall be held to have consented to a hearing on a printed record consisting of those parts designated by the petitioner."

In giving the "Statement of Case" in his brief, Wallis was particular to follow that which was originally set forth in his petition for certiorari, modified only to comply with this Court's Rules. Despite the above quoted provision of Rule 26, and in complete disregard thereof, Pan Am commences its "Statement of Case" with this observation, footnote 3, page 3, to-wit: "In order that all pertinent facts involved are before the Court in light of Wallis' statement of case, references will be made to the **original record and Pan American's original exhibits** * * * ." And then Pan Am proceeds to do just that, in utter **disregard of the printed Record**. Not being content with this flagrant disregard of the Rule, Pan Am even alludes to matters which it does not even pretend are part of the original record! In addition, the entire brief of Pan Am is permeated and replete from start to finish, with distorted statements and conclusions supposedly predicated on these matters which

are beyond the printed Record. All of which is, and was, done for the sole purpose of smearing Wallis with charges of "fraud and deceit," in the frantic hope that in some way Pan Am might prejudice Wallis' position before this Court. As sorely tempted as we are, to indulge in a "full-dress" point-by-point refutation of these unfounded charges, we recognize that this is neither the time nor place to do so. However, we have taken the liberty of preparing a refutation of these improper allegations by Pan Am which we annex to this brief as Annex B. Accordingly, if the Court is disposed to consider the numerous allegations of Pan Am, which are predicated upon matters beyond the printed record, we earnestly request the Court to do so in light of the refutation thereof contained in Annex B.

Pan Am's Opening Statement, pp. 1-3.

The matter here set forth relates to that covered by subsection 5, of Pan Am's brief, and, accordingly, we will consider these pages in conjunction therewith.

"Statement Of Case," by Pan Am. pp. 3-9.

As respects Pan Am's "statement of case," we rest upon what was said above, and more particularly, what we have said in refutation, as contained in Annex "B" *infra*. We ask, that to the extent the Court examines Pan Am's "statement", it do so, in light of the following statement of Judge Wright (R. 71) to-wit:

"With scant excuse, the court permitted parol evidence to show the true intent of the contracting parties on the date the agreements were executed. But, not surprisingly, the documents and testimony produced only confirmed the indication of the written instruments that on January 3 and March 3, 1955, no one contemplated issuance of a lease to Wallis except in pursuance of the then pending ac-

quired lands applications. That was all they talked about. And, quite naturally, that is all they put into their agreements. Doubtless, McKenna and Pan American were both anxious to share in **any lease** Wallis might obtain over these lands. At the time, however, they saw only one means of achieving that end. Had they anticipated the ultimate issuance of a public domain lease, perhaps they would have purchased an interest in that contingency too. But that is a futile speculation. Obviously they cannot be said to have intended to buy a share in a future they did not even advert to. The conclusion must be that the written agreements faithfully record what was in the minds of the parties * * *."

And then consider this statement of Judge Wright, in conjunction with the highly important and crucial proposition of law, the correctness of which **is acknowledged by all parties to this suit**, and the Solicitor concurs. We refer to the proposition of law, that as respects the two Leasing Acts which Congress has adopted, an application for a lease under one statute, absolutely cannot ripen into a lease, if the Land Department determines the character of the land to be such that the lands are governed by the other statute. From this, it necessarily follows, that it was absolutely impossible for Wallis to obtain a lease on the property in question, under his acquired lands applications, since the land was **in fact and in law** not "acquired lands" but "public domain lands," under the decision of the Land Department. The character of the land being "public domain," no matter what Wallis did, or did not do, in connection with his "acquired lands" applications, (1) it was impossible for him to acquire a lease thereunder, and (more important) (2) it was impossible for him to have received the lease BLM 042017, pursuant to such "acquired lands" applications.

1. **"Federal Law Is Applicable," Pan Am, pp. 1-18.**

At the very outset of this argument, Pan Am, at the top of page 12, (1) acknowledges the rule that a Federal equity court has no "power" or jurisdiction (and thus no "duty") to impose "an equitable trust" upon a "legal title" issued by the Land Department, unless Pan Am can show that it "was entitled [thereto] from the Government," *Bohall v. Dilla, supra*, and (2) it further acknowledges the statement of the Solicitor, that the Leasing Act contains no provisions governing the private business relations of parties, as among themselves. Pan Am would attempt to evade the force and effect of these propositions, **not by questioning their soundness or correctness**, but by attempting to distinguish these propositions, along with the cited Land Department decision, by pointing to its unfounded charges of "fraud" and then asserting that such was "inceptive."

The Court will observe that in furtherance of its argument in this connection, Pan Am predicates same upon the **assumption** that Wallis was its "agent." That this assumption **is entirely fallacious**, doubtlessly explains why Pan Am **only concluded** that Wallis was its "agent," and **made no effort to demonstrate**, as a matter of law, that Wallis was in law and in fact its "agent."

That Wallis **was not** Pan Am's "agent," is easily demonstrated, by a few references to Volume 1, American Law Institute, "Restatement Of The Law, Agency," 2d Ed., to-wit:

"(1) Agency is the fiduciary relation which results from the manifestation of consent by one person to another person that the **other shall act on his behalf and subject to his control**, and consent by the other so to act." p. 7

It will be observed that Wallis had filed the "acquired lands" applications, and, was involved in the controversy with Morgan **long before** the option agreement with Pan Am. They were solely Wallis' applications, and, it was solely Wallis' controversy. In securing the lease, Wallis was acting **on his own behalf**, and, subject to **his own control**, for the lease was to be granted by the BLM to Wallis, not Pan Am, and Pan Am had no right thereto (under the agreement or otherwise) until Wallis secured the lease under his acquired lands applications, and then there was only an "option," with no assurance that Pan Am would even elect to exercise the option. We repeat, Wallis was **acting in his own behalf**, not in behalf of Pan Am, and, Wallis was **not** subject to Pan Am's control, and nowhere does Pan Am even presume to so assert that it had any different rights or control.¹⁰

The "Restatement" also has a section entitled "Agency Distinguished From Other Relations," and while there is no specific example of that of "optionor-optionee," there is one dealing with the relationship of "agent or supplier," and it provides (page 75):

"§ 14 K. Agent or Supplier

"One who contracts to acquire property from a third person and convey it to another is the agent of the other **only** if it is agreed that he is to act **primarily** for the benefit of the other and **not for himself**.

"Comment:

"a. Typical situations to which the rule stated in this Section apply are the purchase of shares in a

¹⁰ Indeed, Pan Am stated to the Court below, that: "Pan American did in fact leave the exclusive handling of the applications to the discretion of Wallis to carry them to a conclusion as best he could . . . Wallis had such unrestricted discretion that Pan American never participated in any of the proceedings in the Bureau of Land Management . . ." p. 24, "Original Brief on Behalf of Pan American Petroleum Corporation," Fifth Circuit Court of Appeals.

corporation through a dealer or the purchase of land through a broker. Factors indicating that the one who is to acquire the property and transfer it to the other is selling to, **and not acting as agent for**, the other are: (1) That he is to receive a fixed price for the property, irrespective of the price paid by him. **This is the most important.** (2) That he acts in his own name and receives the title to the property which he thereafter is to transfer. (3) That he has an independent business in buying and selling similar property. None of these factors is conclusive. The question arises in a variety of ways. Thus the issue may be whether or not the supplier is entitled to keep the difference between what he paid for the goods and what it was agreed he should receive from the transferee; if there is an agency, normally this amount must be accounted for. However, a principal may agree that his buying agent is to retain the amount. The issue may arise because of the Statute of Frauds, because an oral order to an agent is not within the Statute, whereas an oral order to a seller, if above the statutory amount, must be in writing. Comment c on Section 14 J states a number of other ways in which it may be important to determine whether a transaction creates a contract of sale or an agency relation."¹¹

Applying this rule to Wallis and Pan Am, if Wallis is to be properly considered to have been Pan Am's agent, it requires the finding that: Wallis acted **primarily** for the **benefit** of Pan Am and **not** for Wallis. Since this was only an option, with the lease to be tendered by Wallis **only** after he secured it, and, then with the right of Pan Am to **elect at that time**, whether or not it would take the lease, how, then, can it be said that Wallis had agreed to act **primarily** for Pan Am, and, not for himself in the procurement of the lease? And particularly when Wallis was already en-

¹¹Comment c on Section 14 J referred to in the "Comment" is not relevant for it deals solely with the relationship of consignor-consignee.

gaged in securing the lease for **himself**, prior to the option agreement, and there is not one single provision in the agreement, showing that they **agreed** that **thereafter** he would not continue to so act, or, that he would act **primarily** for Pan Am. Pan Am did not employ or hire Wallis to secure the lease, if only **paid** Wallis for an **option** to acquire, once Wallis had secured a lease under the acquired lands applications. And it should be observed that Wallis was paying the cost and expenses for so securing the lease, **not** Pan Am.

The above quoted "comment" under the rule, first, gives illustrations of "brokers" as coming under the agency relationship, where the principal has **first** determined the property he desires to acquire, and then designates or agrees that the agent shall acquire it for him. This should **be contrasted** with the situation here involved. The "comment" then gives the **most important** factor in determining the relationship, and that (in the terms of this case) is whether Wallis was to receive a **fixed price** for the lease, **irrespective** of what he paid for it. The option agreement provides that Wallis **would receive a fixed price**, and the "comment" says this is a "sale" and **not** an "agency." As respects the other two factors which bear upon a determination of the relationship, when they are applied herein, the result also negatives the "agency" relationship.

The foregoing conclusively demonstrates that Wallis **was not** Pan Am's "agent," and we will proceed to examine Pan Am's argument in the light thereof.

Both the quotation from the Bible (page 13) and the case of *Massie v. Watts, supra*, and the two hypothets posed upon pp. 14-15 of Pan Am's brief, are predicated solely upon an agency relationship. There is absolutely no analogy between Wallis and Massie, as the above extract from

the Restatement clearly illustrates. And, of course, the argument in the full paragraph on page 15, is but a plea to this Court, **to give** Pan Am that, which in the words of Judge Wright, it did not "buy a share" of.

Pan Am's argument at the bottom of page 14 over to 15, including the case of *Irvine v. Marshall*, *supra*, duplicates McKenna's argument and we fully covered these, in considering McKenna's brief on this point.

In making the argument on page 16 to the middle of page 17, which includes the reference to *Lincoln Mills*, Pan Am proceeds on the assumption that there is fraud here involved, but, even in making this assumption, it is forced to concede (1) that a Federal court of equity has no power or jurisdiction (and thus no "duty") to grant the relief which Pan Am seeks, and, (2) it concedes that "the Mineral Leasing Act lacks an expressed statutory sanction" therefor. Having made these destructive concessions, Pan Am then attempts to analogize the situation to *Lincoln Mills*, with, of course, a failure to consider the factors which were involved in *Lincoln Mills*. Thus the court below conceded that the right of action which Pan Am asserts herein was created under local law, whereas in *Lincoln Mills* the right of action was created by Federal statute. The very admission by the court below that the right of action here involved was created by local law, necessarily conceded that the contract between the parties was authorized and provided for by local law, whereas the contract involved in *Lincoln Mills* was specifically provided for and authorized by Federal statute, and, this Court interpreted § 301 (a) of the Act there involved, as authorizing "federal courts to fashion a body of federal law," rather than merely granting jurisdiction regardless of diversity of citizenship of the parties, saying: "Congress

has indicated by § 301 (a) the purpose to follow that course here," i.e. for the Courts to "fashion federal law." Thus the Court in *Lincoln Mills* had to conclude, that the policy of the statute there involved, and that which the policy sought to accomplish, was so all prevading (along with the other factors above noted, particularly the above interpretation of § 301 (a)) that Congress necessarily **intended** that the courts should fill the interstices of the Act. The *Yazell* case places *Lincoln Mills* in proper focus, as respects the situation here involved, when it recognizes, by strong inference, the serious constitutional question that lurks in the background, any time that this Court might undertake to "make law," as Pan Am would have the Court do herein.

Furthermore, as we pointed out in Wallis' original brief, the very provision of Section 32 of the Mineral Leasing Act (which provides that the Leasing Act should not be construed or held to affect the rights of the states to exercise any rights which they may have), necessarily indicates an intention on the part of Congress that the Courts should not "make law" under the guise of filling the interstices of the Leasing Act, particularly where to do so would affect the rights of the states in the exercise of the rights which the state has. And we submit that this clearly indicates the intention of Congress that the Act should not be construed to interfere with the state's disposition of a cause of action which admittedly arises under state law. But in any event, as the Solicitor acknowledges, the policy of the Secretary, who was designated by Congress to administer the Act, has been to leave these matters to local law and local forums and that, of itself, should be sufficient to reject Pan Am's insistence that this Court "make law."

Wallis does not question the "power" of the Courts

to "make law," in a proper situation, but the questions now before the Court are these (1) is this a situation where the Court has the "power" by inferring Congressional "intent," and (2) assuming such power generally as respects the Act, did Congress intend it to be exercised in this specific instance (a) in light of the administrative interpretation by the Secretary, (b) in light of Sec. 32 of the Act, and (c) in light of the addition of Sec. 30(a) to the Act? We say most certainly not.

The argument at the middle of page 17, to the end of this section, is, in the final analysis, but an appeal to this Court, that it do precisely what this Court refused to do in the *Yazell* case, where this Court refused, even when the United States was a party to the contract. Both Judge Wright and Judge Wisdom pointed out, that local law was adequate in every respect, to afford Pan Am any and all justice to which Pan Am is entitled. And while Pan Am would cry for "uniformity," it would ignore completely the fact that for 45 years, the "uniform" interpretation and application by the Secretary and the Courts, has been to the effect that the Leasing Act does not cover the matter, and Congress intended that local law and local forums should handle such matters.

2. "The Mineral Leasing Act For Public Domain Land," Pan Am, pp. 18-29.

At the outset of this section, Pan Am attempts to cope with Sec. 32 of the Act, citing and quoting cases dealing with provisions of various Reclamation and Irrigation laws. But if the Court will examine each of the cited provisions, and compare them with Sec. 32, it will immediately be seen that, while Sec. 32 is unrestricted in its scope, the statutory extracts cited by Pan Am are, in each instance, entirely restricted in application. In the *Ivanhoe*

case, the Court will perceive that § 8 of the Act there in question, was being advanced (1) in an effort to interdict the United States **itself** in "the operation of the project," and, (2) in the other instance, to render inapplicable an express provision of the Act, where the administrative interpretation was to the contrary, and Congress had ratified such interpretation. Wallis does not pretend, and would not contend, that Sec. 32 prohibits the Secretary from administering the leasing program, in accordance with the provisions of the Leasing Act, which would be the only **relevant** analogy to *Ivanhoe*, as respects the first proposition. As respects the second proposition, Pan Am is not pointing to any **section of the Leasing Act**, which it contends authorizes what it seeks before this Court, in fact it admits there is no such provision. But more important still, is the administrative interpretation of the Leasing Act, which has been entirely **opposed** to Pan Am's contention, in direct contrast to the situation in *Ivanhoe*. Thus *Ivanhoe* is inapplicable.

City of Fresno is obviously inapplicable, for here Wallis is not holding up § 32 in opposition to the exercise by the Government of any of its powers, nor (as in *Arizona*) to the action of any governmental official in pursuance of, or in the exercise of, any governmental power. A mere reading of the extracts from the *Iowa Hydro-Electric* case, discloses its complete irrelevancy.

In connection with these cases, it is our position that Sec. 32 evidences the intention of Congress that the Court is not to fill the interstices, or, in other words, where the cause of action is locally created (as the lower court acknowledged) Congress **did not intend** that the Court, by interstitial processes, should supersede local law in the adjudication of such locally created cause of action. These

cases cited by Pan Am do not meet the thrust of this proposition.

It will serve no useful purpose to examine, in detail, the cases cited on page 26 of the brief, for the *Yazell* case, and those cited in the Solicitor's memo, and in our original brief, encompass the pertinent controlling decisions of this Court. And there being controlling decisions of this Court, an examination of the cited commentaries (pp. 26-27) would be a waste of time.

At the bottom of page 27 and top of page 28, Pan Am seeks to cope with the fact that the State of Louisiana has never ceded jurisdiction over the property here involved. While it cites various cases, Pan Am does not undertake to examine the cases cited by Wallis in this connection, particularly the recent decision of *Paul v. U.S.*, 371 U.S. 245. This was a case where the State **had in fact** ceded jurisdiction, but nevertheless this Court held that locally enacted minimum prices for milk would control the sale of milk, **purchased upon a military reservation**, where the military was purchasing the milk for military consumption, and, in the same case, this Court held that the same local laws were superseded, **by regulations properly enacted under Federal law**, as to similar purchases of milk. Yet in the instance where the regulation was **not operative**, there could be no question but that local law was regulating the exercise of "the plenary power of the United States." The distinction in the two instances is the fact that in one there was **no** Congressional sanction, whereas in the other, **there was**. But most important, this Court did not supersede local law, by indulging in "judicial legislation," as Pan Am suggests (page 27) herein.

As respects the conclusion by Pan Am in the last paragraph of page 28, we are forced to ask, precisely what is the meaning and purpose of § 32 of the Leasing Act?

3. "*Boesche v. Udall*," *Pan Am*, pp. 29-32.

We have fully considered *Boesche* in Wallis' brief, and no further comment is required. As respects *Udall v. Tallman*, 380 U.S. 1, that case involved matters before and in the Land Department, and the Court merely made a passing reference to *Boesche*, saying: "An oil and gas lease does not vest title to the **lands** in the lessee." We have made no such contention. What we do say is, that a lease grants a "right" or "interest" **in the lands** (at least as respects third persons), and **not title to the lands**. This has been the uniform interpretation of the Act by the Secretary, and, the Courts. This has also been the interpretation and application of the Public Land Laws, generally, as respects "inceptive rights," where the legal title **to the lands** is vested in the United States. We submit that a lessee does not enjoy a lesser status.

4. "*Uniformity*," *Pan Am*, pp. 32-37.

Since Wallis cited and analyzed *Hodgson* in his brief, no further comment is required, except to note that *Pan Am* does not purport to consider the points for which *Hodgson* was cited.

As respects the paragraph on page 33 to 34, it can best be characterized (in the words of *Yazell*), as "generalities of paramountcy of the federal interest." *Pan Am* cites no authority for the reference to "the government's admitted public policy against 'lease grabbing'," in fact *Pan Am* does not even explain the meaning of the term. Under the provisions of the Leasing Act, and regulations issued by the Secretary, the Secretary knows who the lessee is, when he **initially** issues the lease, and Sec. 30 of the Act provides that no sublease or assignment shall be **valid until** approved by the Secretary, hence the

Secretary knows the lessee **at all times**, and this very provision of Sec. 30 was enacted by Congress to absolutely **assure** that fact. When counsel speaks of "utter confusion" in the law of Louisiana, he is not being frank with the Court, for he well knows that regardless of what "confusion" may have existed in the past, **there is no longer confusion**. For the State Supreme Court definitely and finally resolved all questions, and this it did while these very cases were pending on appeal, and we refer to the decision of *Hayes v. Muller*, 245 La. 356, 374, 158 So.2d 191 (1963), which is cited and fully discussed by Judge Wisdom, in his second dissenting opinion. (R. 115, fn. 4). Finally, Pan Am refers to 43 C.F.R. 3128.1, which we shall proceed to discuss.

The Court will observe that Pan Am refers to § 3128.1 (being a regulation issued by the Secretary, pursuant to the Leasing Act) as being in direct conflict with the "parol evidence rule," and it will be noted that the Solicitor (p. 16) also refers to this "rule" in conjunction with the regulation. Actually, we believe that it is more proper (in each instance) to refer to the Statute of Frauds. It is our understanding that the "parol evidence rule" operates only in the instances where an attempt is made to enlarge upon a written agreement, but does not exclude parol evidence of the entire agreement. On the other hand, it is our appreciation that the Statute of Frauds excludes **all** parol evidence, where the agreement relates to the title to real property, or rights and interests therein or thereto, regardless of whether the agreement be entirely oral, or partially oral. With this explanation of our concept, we turn to a consideration of the Regulation in question.

There are several reasons why Pan Am can take no consolation from § 3128.1 of the Regulations. In the first place, the Regulation is not applicable in this instance, for

it had not been adopted by the Secretary, when this lease was granted. The effective date for the lease here in question was January 1, 1959 (R. 56), and the applicable Regulation **at that time** was 43 C.F.R. § 192.141, found in the 1954 revision of the Code. This Regulation speaks only in terms of "instruments," making no reference to oral agreements. It was not until June 6, 1959 that the Secretary promulgated, for the first time, (Circular 2019, 24 Fed. Reg. 4630) a Regulation that was, in substance, similar to what now appears in 43 C.F.R. (Supp. as of April 1, 1924) § 3128.1. This was approximately six months after the effective date of the Wallis lease; and, more important still, it was several years after the dates of the alleged agreements which respondents are herein asserting. Thus § 192.141 only required a lessee to disclose "instruments" which evidenced ownership of an interest in, or right to, a lease, and, this is in accordance with the provisions of the lease issued to Wallis which provides (R. 58) under sub-paragraph "(m) Assignment of oil and gas lease or interest," that the lessee "file for approval within 90 days from the date of final execution **any instrument of transfer * * ***, such **instrument** to take effect upon the final approval * * *." Thus, we repeat, that neither the lease in question, nor the Regulation applicable thereto, required the filing of anything but "**instruments of transfer**," and neither made any requirement of disclosure as respects parol or oral agreements.

It is true, that the Solicitor alluded to the present day Regulation, but he was obviously speaking of conditions which now prevail, and, apparently through oversight, failed to note the significance of the date of this lease. But even were the present Regulation, § 3128.1 applicable to the Wallis lease, generally, nevertheless, it would have no bearing on this case. The first and most obvious rea-

son, is pointed out by the Solicitor in his brief (p. 16), where he notes that a lessee could not attempt to shield himself from disclosure of oral agreements to the Secretary, under the guise of pleading a local statute, such as the Statute of Frauds. Thus the policy of the Secretary, since the enactment of the Act, has been to leave the controversy over private disputes to local law and local forums, where, of course, the Statute of Frauds and other provisions of local law will determine whether a party does or does not have an enforceable contract, and thus an interest in a lease, as in the case at bar. Under these circumstances, there would be no conflict between this practice of the Secretary, and, § 3128.1. On the other hand, Regulation § 3128.1 is designed to force a disclosure of an oral agreement, in a situation where the lessee is willing to be bound by an oral agreement and waives whatever benefit he might have under local law to treat the oral agreement as unenforceable. Hence, if there is an oral agreement, which the lessee is willing to be bound by, intending to, (and does) carry out and abide by, then the present Regulation is designed to require a disclosure thereof. Therefore, where he is giving effect to the oral agreement, he cannot fail to disclose it to the Secretary, and plead, in justification of such failure, the fact that under local law he is not bound thereby. On the other hand, if, because of local law he is not bound and he avails himself of local law to deny that he is bound by an oral agreement, and, the local court so holds, then, of course, he is not required, under the cited Regulation, to disclose the alleged oral agreement to the Secretary.

But even if § 3128.1 is found to be applicable to the Wallis lease, generally, and the interpretation thereof by the Solicitor is not accepted, but the interpretation advanced by Pan Am is accepted, as correct, nevertheless, the

Regulation, as so interpreted, would necessarily recognize that the Secretary considers a matter of this nature, as coming within the authority delegated to him, under § 32 of the Act. Being a matter which Congress has placed under the jurisdiction of the Secretary's regulatory authority, this grant of power to him necessarily precludes any grant of interstitial authority to the Courts. In the end, as in the beginning, we are back to the proposition that the policy in administering the Act, by the Secretary, has been to leave disputes between private individuals to local law and local forums, and to the extent that § 3128.1 may be applicable to the lease here in question, as well as the agreements here in question, that is a matter between Wallis and the Secretary and these plaintiffs have no right to champion the cause of the Secretary.

However, we repeat, that the Solicitor has placed the proper interpretation upon the Regulation in question, assuming its applicability, and such interpretation is contrary to that which Pan Am would now advance. It should be borne in mind that the Solicitor's memorandum was necessarily prepared in light of the views of the officials of the Department of the Interior and, unquestionably, expresses the views of these officials.

Pan Am's argument on page 34 to the middle of page 35, is best answered, by the fact that 45 years experience in the operation of the Leasing Act, and program thereunder, during which time Pan Am's "uniformity" has not existed, discloses none of the dire consequences that Pan Am envisions, and, indeed, "the business of the United States" has gone on, and thus conclusively demonstrating that it "may go on without (such) uniformity," all without a scintilla of damage thereto.

At page 36, Pan Am cites *Hood v. McGehee*, 237 U.S. 611, and the Court should note that in this argument

Pan Am is willing to concede that a federal lease is a "real right the situs of which is in (a) particular state," and thus subject to local law, for purposes of descent and distribution. Which, of course, is diametrically opposed to Pan Am's argument elsewhere. First, because Pan Am elsewhere refuses to acknowledge that a Federal lease is a real right, having a situs within a state, and, second, because Pan Am refuses to acknowledge that this real right is subject to local law in relation to the various other subdivisions of local law, in addition to descent and distribution. Nothing contained in *Hood*, denies the **power** of Congress to regulate the devolution of a Federal lease. If Congress has the **power** to regulate a transfer by contract, so does it have like **power** to regulate a transfer by intestacy and vice versa. The question in the case at bar is whether that **power** has been exercised by Congress, and Judge Wisdom points out, (and correctly so), that that which the majority below points to, as the exercise of such power by Congress, in the case of transfer by contract, is equally applicable to a transfer upon death. For the majority below made no distinction therein. In *Hood*, the Court said: "Alabama is the sole mistress of **Alabama land**." Cf. *United States v. Burnison*, 339 U.S. 87 (1950).

5. ***"If The Court Holds That The Law of Louisiana Does Control, The Case Should Be Remanded For A Determination That The Writings In The Record Meet The Requirements Of Such State Law," McKenna, pp. 23-24.***

"Issues Asserted on Merits of the Case by Pan American but not passed upon by the Court of Appeals," Pan Am, pp. 37-48, also pp. 1-3.

The argument contained in the above referred to pages of McKenna's and Pan Am's briefs, are, in the main, directed at considering local law as it applies to the issues

herein. In actuality, we interpret these pages of the briefs as directed primarily at what decree should be entered by this Court, in the event it reverses the decision of the Court of Appeal.

In Wallis' original brief, as relief in the event this Court reversed the judgment of the Court of Appeal, he asked that the decision of the Court of Appeal be set aside and the judgment of the District Court made final. In doing so, he predicated it upon the provisions of 38 U.S.C. 2106:

"§ 2106. Determination

"The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances. June 25, 1948, c. 646, 62 Stat. 963."

If this Court concludes that the majority below was in error, and reverses its decision, then, unquestionably, this case is controlled by *Erie*, and local law is decisive.

As to the controlling effect that the applicability of local law would have upon the issues herein, it is noteworthy that, below, Circuit Judge Wisdom and District Judge Wright, both concluded that Wallis should have judgment. The other two Judges involved, Circuit Judge Rives and District Judge Bootle, **did not disagree**. Thus below, and on the question of the correct applicability of local law, at the most, it can only be said that the Judges are equally divided. Yet of these four Judges, only Judge Wisdom and Judge Wright had a background of training

and experience with, and in, the law of Louisiana, and, as noted, they held that local law was such that Wallis should have Judgment. In addition, and on the crucial question of the applicability of the local Statute of Frauds, it cannot be denied that under *Erie*, a Federal Court would be bound to apply and follow the decision by the Supreme Court of Louisiana, in *Hayes v. Muller*, *supra*, rendered while these cases were pending on appeal below, but considered and cited by Judge Wisdom in his dissent on rehearing (R. 117). A mere reading of this case, will conclusively demonstrate the correctness of Judge Wright's decision, which Judge Wisdom said was correct and should be affirmed.

We, therefore, submit that this Court should so consider the case, and, in reversing the Court below, reinstate the Judgment of Judge Wright, as final.

As Pan Am points out (p. 48), these cases have been pending for seven years. Additionally, the record shows that Wallis initially applied for the lease in question in 1956; that he was involved in litigation throughout the Department of the Interior, to and including an Appeal to the Secretary of the Interior, and, thereafter, into the Federal courts in Washington, D.C., to and including the denial therein of writs of certiorari by this Court. As Pan Am further points out (p. 8, fn. 4), the lease in question has been developed and is presently producing. Yet, because of this litigation, Wallis is denied the right to have, enjoy and utilize the proceeds from this production, which is presently being withheld, even though Wallis is clearly entitled thereto. Further delay will serve no useful purpose and this Court can properly make a final determination. These plaintiffs have had their day in Court and, we submit that, the proper decree to enter in the event

of a reversal of the Court of Appeal, is the reinstatement of the judgment of the District Court, as the final judgment herein.

Respectfully submitted,

C. ELLIS HENICAN,
MURRAY F. CLEVELAND,
Suite 2601, 225 Baronne Street,
New Orleans, Louisiana 70112;

H. M. HOLDER,
1300 Beck Building,
Shreveport, Louisiana 71101,
Attorneys for Petitioner.

CERTIFICATE OF SERVICE.

I, C. Ellis Henican, hereby certify that a copy of the foregoing Brief For Floyd A. Wallis, was served upon Counsel of Record, representing Respondent, Patrick A. McKenna, and, representing Respondent, Pan American Petroleum Corporation, and the Solicitor General, Department of Justice, Washington 25, D. C., by enclosing each such copy in an envelope, duly addressed to each such Counsel of Record and the Solicitor General, at his post office address, with the required air mail first class postage prepaid and affixed thereto, and depositing same in the United States Post Office at New Orleans, La., on this _____ day of February, 1966.

Counsel of Record for Petitioner.

**ANNEX "A"—Analysis Of Authorities Cited By
The Court In Support Of The Statement Quoted
At Page 9 Of McKenna's Brief.**

Of the authorities so cited by the Court, the first, *Gibson v. Chouteau*, has already been discussed in the body of this brief, *supra*, p. 11. *Sparks v. Pierce*, 115 U.S. 408, does not support the majority decision, but cites and follows the case of *Bohall v. Dilla*, *supra*. This case involved one who was claiming the land as mineral land, and the defendant was claiming that it was townsite land and thus subject to patent under the town-site law. The Land Department ruled that it was mineral land, and plaintiff was entitled to a patent, with a reservation of the surface for town-site purposes. This was reversed by the Commissioner, who concluded it was mineral land, subject only to mineral patent, and there was no authority to make reservation of the surface. The patent issued, and the Court held that for defendant to prevail in equity, he would have to "show a better right to the land than the patentee, such as in law should have been respected by the officers of the Land Department, and being respected, would have given him the patent." Here the defendant was not claiming equities, based upon a private transaction with the plaintiff therein.

Van Brocklin v. Tennessee, 117 U.S. 151. The inappropriateness of this decision to the case at bar is apparent from the mere statement of the question involved, by the Court, at page 153: "The question presented by this writ of error is whether lands in the State of Tennessee, which, pursuant to Acts of Congress for the laying and collecting of direct taxes, are sold, struck off and purchased by the United States for the amount of the tax thereon, and are afterwards sold by the United States for a larger sum, or redeemed by the former owner, are

liable to be taxed, under authority of the State, **while so owned by the United States.**" We are not here concerned with local law operating directly upon Federal lands. The question here is whether local law regulates private contracts or transactions which purport, in turn, to relate to public lands, prior to the issuance of legal title thereto.

Widdicombe v. Childers, 124 U.S. 400. The facts appearing from footnote one of the majority opinion (R. 82), disclose why this case is not applicable herein. To a certain extent it is the converse of the case of *Williams v. U. S.*¹ Here the party asserting equities **as against** the patentee derived his rights (and equities) from the fact that he held under one who had dealt directly with the Land Department and he did not hold or claim under the patentee. Thus the plaintiff's ancestor in title had applied for the SE¼, but the register, by mistake, described it as SW¼. However, he and those under whom plaintiff claimed went into possession of the proper quarter section and the entry on the plat and tract books had been correctly made. Some 22 years later, without authority in law, the entry on the plat and tract books was changed, and thereafter, with full knowledge of the facts, Widdicombe made entry and obtained a patent. Here, as in *Williams, supra*, the patent had issued by mistake in the Land Office, but differently than in *Williams*, the plaintiff derived his equities directly from dealings with the Land Department, and did not claim **only** through private dealings with the only one—the patentee, who had dealt with the Land Department.

Felix v. Patrick, 145 U.S. 317. In this case Felix was an Indian, and, by treaty, was entitled to receive land scrip for land, which scrip had issued to her. How-

¹ The *Williams* case is discussed in detail at pages 54-56 of Wallis' Brief.

ever, the pertinent Act of Congress provided that "no transfer or conveyance of any of said certificates or scrip shall be valid." By fraud, Felix was induced to execute a blank power of attorney to locate the scrip, and a deed conveying land, but with the grantee and description of land in blank. These came into the hands of Patrick and he caused the scrip to be located with the name of William Ruth inserted in the power of attorney, and caused the deed to be completed by inserting his name as grantee and by also inserting the land description. Several years afterwards, Patrick secured a confirmatory grant from Congress. Later, upon the death of Felix, her heirs discovered the transaction, and sued to have it decreed that Patrick held the land in trust, charging Patrick with fraud and full knowledge of all facts. The case went upon a demurrer, and judgment was actually affirmed in favor of Patrick, based upon laches. Here you have the parties asserting equities, and basing their claim on scrip issued by the U. S., and (1) claiming fraud as respects the patentee, in being divested of the scrip, (2) asserting the prohibitory statute as respects the transfer of the scrip, and (3) alleging fraud in the procurement of the patent and the purported sale of the land. Clearly this case is not analogous to, or controlling of, the cases at bar.

The case of *U. S. v. Colorado Anthracite Co.*, 225 U.S. 219, involved the interpretation of an Act of Congress, and arose in the Court of Claims. One Stoiber entered land, furnishing false statements to the Land Office that the land was sought for himself and not others. Actually he was representing the plaintiff company. Another claim was made for the same land, and a hearing was had as respects the adverse claim, **at which hearing the true facts were disclosed.** The hearing resulted in favor of Stoiber, and he then received \$3,200 from the company

to pay for the land, which money was paid to the Land Office. On appeal, the decision was reversed, and Stoiber's entry was ordered cancelled. This suit was by the company to recover the purchase price, under an Act of Congress, which provided that where an entry had been erroneously allowed and could not be confirmed, and was cancelled: "the Secretary of the Interior shall cause to be repaid to the person who made such entry, or to his heirs or assigns" the money so paid. Thus the whole case revolved around the proper **interpretation of a Federal statute**, and the term "his * * * assigns." The Court said:

" * * * But here there was something more than a mere quitclaim deed, executed in advance of the acquisition of any interest by the entryman. The entry was made at the instance of the company, with its money and for its benefit, and, unless the coal-land law forbade it, the entryman, by his voluntary action in that regard, became a trustee for the company, and charged with an obligation to convey the land to it. *Irvine v. Marshall*, 20 How. 558 —; *Ducie v. Ford*, 138 U.S. 587, 592 —; *Smithsonian Institution v. Meech*, 169 U.S., 406. * * * Not only so, but equity, which usually looks upon that as done which ought to have been done, would regard such a conveyance as actually made, and therefore treat the company as an assign. We speak of the view which equity would take of the matter, because it is manifest that the act of 1880 proceeds upon equitable principles and is intended to be administered accordingly. Like other highly remedial statutes, it should be interpreted with appropriate regard to the spirit which prompted it. And, when it is so interpreted, we think the term 'assigns' includes one in the company's situation, if only the arrangement between it and Stoiber was not forbidden by law." (p. 223.)

Here the Court was interpreting a Federal statute, in

light of equities, with no room for local law to apply, and it simply cited and followed the *Irvine* case. However, this was not concerned with a question of local law, but whether the Court wished to attribute equities to a private transaction just as the Land Department would have had the "power" to apply equitable considerations, had it actually involved a claim to the land, made prior to issuance of a patent. We submit this case is not controlling.

Bucher v. Bucher, 231 U. S. 157. The sole question here involved was whether lands acquired under the Homestead Laws of the United States and patent therefor issued to the husband would be community property of husband and his wife? The Court held it was, and that state law did not operate, **until the legal title had issued**, and hence this did not interfere with Federal interests. This case is obviously not controlling herein.

Ruddy v. Rossi, 248 U.S. 104, simply holds that where Congress **provided by statute** that lands upon the issuance of a patent shall not be liable for antecedent debts of the patentee, such provision is controlling. Here there was a specific Act of Congress made applicable, and perforce local law must give way. Such is not the case at bar.

We submit that the analysis of the cases cited in prior sections of this brief demonstrates that those analyzed in this section are not decisive of the issues here involved. As respects the majority opinion's reference to 73 C. J. S. *Public Lands* § 209, due consideration was not given to the implications of subparagraph f. thereof, and particularly that part which states that "all evidence must be produced which would **be required in the general land office** for the issuance of a patent." As respects decisions by the Supreme Court of the United States, cited in support of the text, they are: *U. S. v. N. O. Pac. R. Co.*,

248 U.S. 507; *Independent Coal and Coke Co. v. U. S.*, 274 U.S. 640; *Utah v. U. S.*, 284 U.S. 534; *Holt v. Murphy*, 207 U.S. 407; *Great No. R. Co. v. Hower*, 236 U.S. 702; *Simmons v. Ogle*, 105 U.S. 271; and *Carr v. Fife*, 156 U.S. 494.

The *N. O. Pac. R. Co.* case, *supra*, is not relevant, for it related to a Federal statute concerning settlers on odd-numbered sections of land, as opposed to a grant of odd-numbered sections to the railroad company. The *Independent Coal and Coke Co.* case, *supra*, involved a suit by the U. S. to impose a trust on lands held by one who had **fraudulently induced** the lands to be transferred to the state of Utah, and then secured the legal title from the State of Utah. It is similar to *U. S. v. Williams*, *supra*, except the land was transferred by the U. S. as a result of fraud, rather than mistake, no private transactions were involved, and the U. S. cited and relied upon the *Williams* case.

The *Utah* case, *supra*, was merely a sequel to the *Coal and Coke Co.* case, where the U. S. was seeking a return of the lands from the State of Utah. The *Holt* case, *supra*, involved conflicting entries, where the senior entry was cancelled as a result of a waiver, and patent issued pursuant to the junior entry. The suit asserted fraud as to the execution of the waiver, pursuant to which the senior entry was cancelled. The *Great N. R. Co.* case, *supra*, was a contest resulting from a grant of land to a railroad, as opposed to a homestead entry made thereafter, but based upon a claimed settlement prior to the railroad selection, but it developed that the homesteader had not settled upon the land in question, but through mistake had settled on other land. The railroad prevailed. The *Simmons* case, *supra*, involved a conflict between different entries, and there was some evidence that there might have been a mistake

as to the senior entry, but it was not conclusive, and the patent prevailed.

As respects the reference to *42 Am. Jur., Public Lands*, § 37, the text contains this statement: "To charge the holder of the legal title to land under a patent as trustee of another, the claimant **must show himself** entitled to it and its refusal to him in consequence of errors **in the rulings of the Land Department** upon the law applicable to the facts found." Such is not the case here. As respects the Supreme Court cases cited, generally, to support the text, some of them have already been considered herein, and, as to others, in view of the foregoing statement from the text, and the further fact that after a review of these cases, it is our opinion that they neither add to nor detract from what has already been said, we, therefore, do not deem it necessary to review all of them in detail.

**ANNEX "B"—Wallis' Reply to Pan Am's Charges
of Fraud On the Part of Wallis, Based on Matters
Beyond The Printed Record**

Pan Am's effort to blacken Wallis' reputation is an unbelievable act of desperation that is founded upon its obvious realization that Pan Am actually has no position before this Court based on the issues upon which certiorari was granted.

If the Court will carefully examine the opinion of Honorable J. Skelly Wright, Trial Judge, it will find, at R 71, the following statement:

"With scant excuse, the court permitted parol evidence to show the true intent of the contracting parties on the date the agreements were executed. But, not surprisingly, the documents and testimony produced only confirmed the indication of the written instruments that on January 3 and March 3, 1955, no one contemplated issuance of a lease to Wallis except in pursuance of the then pending acquired lands applications. That was all they talked about. And, quite naturally, that is all they put into their agreements. Doubtless, McKenna and Pan American were both anxious to share in **any lease** Wallis might obtain over their lands. At the time, however, they saw only one means of achieving that end. Had they anticipated the ultimate issuance of a public domain lease, perhaps they would have purchased an interest in that contingency too. But that is a futile speculation. Obviously they cannot be said to have intended to buy a share in a future they did not even advert to. The conclusion must be that the written agreements faithfully record what was in the minds of the parties * * *."

These conclusions were reached by the Trial Judge after hearing all of the witnesses and upon considering all extrinsic evidence, including Sandel, house counsel and

principal witness for Pan Am, involving a direct conflict with the testimony of Wallis, and Judge Wright resolved this question of credibility in favor of Wallis and against Pan Am, as we shall point out more in detail hereafter.

Rule 9 of the Federal Rules of Civil Procedure requires: "In all averments of fraud * * *, the circumstances constituting fraud * * * shall be stated with particularity." Yet if the Court will examine the complaint (R. 32) of Pan Am, it will not find a single allegation with reference to "fraud" on the part of Wallis as respects the acquisition of lease BLM 042017, even of a **general nature**, much less with "particularity."

The Court will further observe from Pan Am's complaint, that, in bringing its suit, Pan Am (Article XI) relied upon what it characterized as being a **contemporaneous construction** of the option agreement, predicated upon an **alleged** conversation which Wallis supposedly had with Pan Am's house counsel, Sandel. Wallis denied any such conversation, and, the Trial Court resolved this conflict in testimony between Wallis and Sandel, in **Wallis' favor**, saying (R. 72): "But all the evidence, **including Sandel's own correspondence**, contradicts that assertion." Further examination of the other allegations of the complaint, will show that it was this nonexistent "contemporaneous construction" which serves as the predicate upon which Pan Am would now attempt to construct its charges of fraud.

Thus, in seeking to recover on its contract, Pan Am did so, depending upon the vehicle of false testimony, supplied by its house counsel. During the course of Sandel's testimony, Wallis forced the production from Sandel's files of a letter which completely destroyed Sandel's testimony and credibility. When the case was briefed before Judge Wright, Pan Am, **for the first time**, appreciated the de-

structive effect of Sandel's letter, upon Sandel's testimony. Thereupon, and for the first time, Pan Am abandoned its basis for recovery as reflected by the complaint, and, in frantic desperation, Pan Am commenced its charges and allegations of fraud on the part of Wallis.

Accordingly, Pan Am stands convicted of entering a court of equity and seeking the equitable remedy of specific performance, **based upon false testimony.**

However, there is another highly important aspect of the case, in light of which, Pan Am's charges of fraud should be examined. We refer to the allegations of Pan Am's complaint (R. 32). Pan Am **now** says that the filing of the application for the public lands lease by Wallis, with the **intent to keep the lease**, when issued, for himself, was fraud. Yet in Art. XII, in speaking of the filing of the application, Pan Am alleges Wallis' action "was in strict conformity with the obligations of Wallis" under the agreement. (R. 35).

Likewise Pan Am **now** asserts that Wallis did not take a definitive position before the Land Department,¹ that the land was "acquired lands," and, that this constituted "fraud" on Wallis' part. Yet in Art. XIX, in speaking of such failure to take a "definite position," Pan Am alleged that such failure of Wallis to take a "definitive position," conforming (conformed) strictly to his obligations under the option agreement * * * " (R. 37).

We earnestly ask the Court to consider the foregoing comparison, and then appraise Wallis' position in light thereof. Thus, we have Pan Am conceding and alleging that this action taken by Wallis, **was not only entirely**

¹ As we shall demonstrate hereafter, Wallis *did take* a definitive position in the Land Department, that the land was in fact "acquired lands."

proper, but precisely in accordance with his obligations under the option agreement. Yet when the Court construes the contract contrary to Pan Am's construction thereof, Pan Am says that such action by Wallis, **was improper and constituted fraud**. We ask the Court to view Wallis' predicament at the time Wallis was initially confronted with the choice, or question, of whether or not he should take these actions which Pan Am NOW says were fraudulent. If Wallis had accepted Pan Am's construction of the Agreement, Pan Am alleged that he was **obligated to do so** by the agreement, which necessarily requires the further conclusion, that if Wallis **had not** taken such actions, then he would have breached his obligation under the contract, and would have been liable to Pan Am for breach of contract. Is it not obvious that action taken under these circumstances (at Wallis' peril) could not possibly constitute fraud? We remind the Court that Pan Am was construing a contract which its own house counsel drafted and prepared. But let us pursue the matter further, suppose that, at the time, Wallis **had not** taken such action, assuming the risk of being held liable for failure to comply with the agreement. Pan Am does not get the lease, and neither does Wallis. If the Court then disagrees with Pan Am's construction of its own agreement, it holds Wallis was not obligated to take such action and, therefore, not liable to Pan Am for breach of the agreement. But still, **neither he nor Pan Am would have had the lease**. What then is the other side of the coin? If, when Wallis is confronted with the choice of whether or not, to take such action, and if he had construed the contract at that time (as he actually did and now does contrary to Pan Am's construction), then he was **not obligated under the option agreement**, and, not being so obligated, he was necessarily free to do so, and he would have received the lease free of claim by Pan Am. But he **does not get** that which

Pan Am would have otherwise gotten under the option agreement.

In light of this analysis, it is clear beyond question, that when Wallis took the action in question, and, pursued the course which he followed, his actions were entirely proper and it is impossible to characterize them as fraudulent. For, by such action, he made certain that the lease would be secured for one party to the agreement — entirely dependent upon whether, as a matter of law and under a proper construction of the agreement by the Court, Pan Am was, or was not, entitled thereto.

We repeat, that it is impossible, as a matter of law, to characterize Wallis' actions as fraudulent, and that no Court of Equity could condemn Wallis for acting as he did, when confronted with the situation which had developed. However, we shall examine Pan Am's charges further.

As respects the controversy within the Department of the Interior, between Wallis and Morgan, over their respective "acquired lands" applications, Pan Am alleged (Article XVII) that: "In the aforesaid controversy Wallis failed to take a definitive position on whether the lands applied for by him are of the one type or the other, i.e., whether acquired lands or public lands * * *" This allegation was proven to be absolutely false, for in his "protest" of Morgan's application, Wallis specifically alleged (Item 170 of Wallis' Note of Evidence, p. 3): "1. The lands in controversy are acquired lands of the United States * * * They are administered by the Corps of Engineers * * * Such lands are subject to leasing * * * in accordance with, and only in accordance with * * * the Mineral Leasing Act for Acquired Lands * * *" In support of this allegation, Wallis prosecuted his protest before the first administrative level, lost there, and appealed to the Director. It should be observed that the prosecution of this appeal, included a sup-

porting, and assertion, of the above allegation of the "protest" concerning the "character" of the land. Mastin White, Wallis' attorney, had prosecuted the appeal before the Director to completion, to the extent that White had filed all necessary briefs, and the matter was submitted to the Director for a decision prior to White's withdrawal, in November 1955, and the employment by Wallis of Mr. Harry Edelstein, a former Assistant Solicitor in the Department of the Interior, to take over the matter from White. It is true that the Director, by his decision of June 7, 1956, ruled adversely, as respects the appeal taken, prosecuted and submitted by Mastin White on Wallis' behalf, and, the Director rejected White's contentions and assertions that the land was "acquired" and held that it was "public domain."

But the crucial factor to be noted, and which refutes all of Pan Am's claims of any improper action or inaction by Wallis, is the fact that Wallis **did take a definitive position** that the lands were "acquired" and Wallis prosecuted this on appeal to the Director where the adverse decision was finally made. The only question that remains is whether or not this appeal by White was adequately prosecuted. It necessarily goes without saying that in Mr. White's opinion he had done everything that was necessary in the prosecution thereof. Additionally, Mr. Harry Edelstein, upon his employment, reviewed the work that Mr. White had done, and he testified that in his opinion there was nothing further that he need do, or did,² in support of

² Indeed, Pan Am stated to the Court of Appeal: "Edelstein confirmed (R. 564) that insofar as the 'acquired lands' applications were concerned there was then an appeal by Wallis from the refusal to recognize his acquired lands applications and from an order recognizing Morgan's acquired lands application and that until November 16, 1955 Wallis had filed all the necessary documents in support of the appeal, a brief on appeal, and the reply, and in the opinion of Edelstein what had been done was adequate * * * " p. 34, "Original Brief on Appeal on Behalf of Pan American Petroleum Corp. 5th Circuit, Court of Appeal."

the pending appeal. Consequently we find his approval as to the adequacy of White's prosecution of the case, and, more particularly the contention that the land was "acquired." But we do not have to rest solely on the opinions of Mr. White and Mr. Edelstein, **for we find that Pan Am likewise approved, as to the adequacy and sufficiency, of what was done on Wallis' behalf, in asserting that he land was "acquired."**

In confirmation of this last statement, we direct the Court's attention to the following irrefutable facts, viz:

1. Mr. Neil Stull, who was Pan Am's Washington attorney and expert on Department matters, wrote a letter to Pan Am (quoted at page 10 of Wallis Petition for Certiorari, fn. 15), and in this letter he advised that he had actually collaborated with Mr. White and had been "permitted * * * to participate in the handling of the case." He further stated that he had "very carefully" reviewed the brief which Mr. White had submitted to the Director and that he did not "believe that it can be improved upon * * * (and it) meets with my complete approval. **I do not believe that I could raise any points which have not been raised by Mr. White * * ***" Here then is Pan Am's own expert on Department of Interior matters, unqualifiedly approving the assertion and prosecution by Wallis, including all that was being said and done by Wallis in an effort to have the character of the land determined to be "acquired" land, and Mr. Stull said it could not be "improved upon."
2. At about the time the matter was being submitted to the Director on appeal, Wallis discussed the question of the character of the land with Sandel, Pan Am's attorney and house counsel, and Sandel prepared a memorandum in November of 1955 (Original Exhibit, Sandel

X-4), in which Sandel stated that he had examined the question as to the character of the land, and he set forth in detail his views as to why the land was "acquired." If the Court will take this memorandum and compare it with what is disclosed in the Director's opinion of June 7, 1956,³ it will see that there was absolutely nothing contained therein which was not before, and considered by, the Director at the time of his ruling upon the character of the land.

3. In addition to the foregoing, and more important still, we find this highly significant admission made by Pan Am in its brief, at page 3-4, to-wit: "Pan American's attorneys were cognizant of the form and status of the Wallis acquired lands applications and **approved the actions of Wallis until ABOUT AUGUST 1965 * * ***"⁴ This is necessarily predicated upon the letter of Mr. Mr. Stull, above referred to, and, therefore, shows that Pan Am admits that Wallis had properly prosecuted his position before the Director that the lands were, in fact, "acquired."

In light of the foregoing, and more particularly the highly destructive admission which Pan Am is forced to make, because of Stull's letter, it is impossible for Pan Am to now contend that Wallis did not adequately prosecute and maintain his "acquired lands" applications, and, more particularly, that he did not assert the character of the land to be "acquired."

And while Pan Am did attempt to complain and criti-

³ Pan Am quotes this decision at page 6 of its brief, referring to it as "Pan Am's Or. Ex. C-6." Furthermore, this is the same decision we referred to, in connection with the discussion of McKenna's brief, *supra*, p. 10, fn. 3, and we have deposited a copy thereof with the Clerk, for the Court's convenience.

⁴ This highly damaging admission by Pan Am was characterized in the court below as follows: "It is admitted by Pan Am that Wallis acted properly * * * until in late 1955 or early 1956 * * *," P-23, "Original Brief On Behalf of Pan American Petroleum Corporation," Fifth Circuit Court of Appeal.

cize Wallis because of what he did not do after the adverse decision by the Director, to this very date and throughout the trial of this case Pan Am has never produced one single witness, or, one shred of evidence, relating to the question of the character of the land, which had not already been submitted to the Director and considered by the Director in his decision. "Diligence in law means doing everything reasonable, and not everything possible." *Cameron v. Lane*, 36 La. Ann. 716.

Despite the foregoing, the reported decision of the Secretary of the Interior of August 27, 1958, to which Pan Am refers in Article XVI of its complaint (R. 36), as reported at 65 I.D. No. 9, shows that Wallis did, in fact, appeal the decision of the Director, to the Secretary of the Interior, insofar as his "acquired" lands lease-offers were concerned, despite the effort on the part of Pan Am to make it appear that he did not do so, when Pan Am (bottom of page 7) only quotes an extract from the "findings of fact" by United States District Judge Hart. For Judge Hart also found as a fact that, "On February 6, 1958 Wallis also asked the Secretary to exercise his supervisory authority over the rejection of his acquired lands offers. The Secretary granted the request for exercise of his supervisory authority and considered the questions provided by those requests * * *"

At page 4 of its brief, Pan Am acknowledges that the lease actually issued to Wallis on December 19, 1958. Accordingly, under the option agreement (R. 40) with Pan Am, any rights which Pan Am had to the lease, as issued, were crystalized **at that time**. The lease then belonged to Wallis, or, Pan Am was entitled to it. Because of this fact, whatever Wallis did thereafter, and more particularly in the suit filed by Morgan in the District Court against the

Secretary of the Interior (referred to on page 7 of Pan Am's brief), had no bearing on the option agreement or Pan Am's rights thereunder, for either Wallis had performed, or, the matter was of no concern to Pan Am since it had no interest. Such being the case, Pan Am's comments concerning the Morgan suit are entirely irrelevant. However, in this connection, we point out, for the Court's information, that Pan Am intervened in that suit on the side of the Secretary and Wallis, alleging "Wallis' defense and that of the defendant Seaton and also that of Pan American Petroleum Corporation presenting essentially identical questions of law and fact." Item No. 163 of Wallis' Note of Evidence.

While the matters discussed in Annex "B" are not germane to the issue before the Court, as presented by this appeal, we have felt constrained to submit the foregoing **only** because Pan Am has gone beyond the printed record, contrary to the Rules of this Court, in trying to discredit Wallis. It is submitted that the foregoing completely refutes the baseless charges of Pan Am.



SUPREME COURT OF THE UNITED STATES

No. 341.—OCTOBER TERM, 1965.

Floyd A. Wallis, Petitioner,	}	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.
v.		
Pan American Petroleum Corporation et al.		

[April 25, 1966.]

MR. JUSTICE HARLAN delivered the opinion of the Court.

This case presents a question concerning "federal common law" best explained after a summary of the facts and the legal proceedings involved.

At stake in the litigation are rights in several tracts, aggregating 827 acres, of oil-rich "mud lumps" or islands owned by the United States and located in a mouth of the Mississippi River near Burrwood, Louisiana.¹ In 1954 petitioner Floyd Wallis filed with the Secretary of the Interior applications for a lease to exploit oil and gas deposits in the tracts. Because the tracts were deemed by Wallis to be "acquired lands" of the United States rather than "public domain lands," these applications were filed under the Mineral Leasing Act for Acquired Lands, which governs the former, instead of the Mineral Leasing Act of 1920, which controls the latter.² Subsequently, Wallis entered into a written joint

¹ Louisiana is said to have challenged the title of the United States in another suit, see *McKenna v. Wallis*, 200 F. Supp. 468, 470, n. 2, but in this case the parties accept the premise of federal ownership.

² The Mineral Leasing Act for Acquired Lands is 61 Stat. 913, 30 U. S. C. §§ 351-359 (1964 ed.); the Mineral Leasing Act of 1920 is 41 Stat. 437, as amended, 30 U. S. C. § 181 *et seq.* (1964 ed.). While the precise distinction is of no concern here, in

2 WALLIS v. PAN AMERICAN PET. CORP.

venture agreement with respondent Patrick McKenna giving McKenna a one-third interest in the pending applications and any lease issued under those applications. Then Wallis, who had exclusive management of the property under his agreement with McKenna, sold respondent Pan American Petroleum Corporation an option to acquire any lease Wallis might obtain under the applications then on file with the Secretary.

In 1956, fearing that the tracts might prove to be public domain land, Wallis filed new applications for the same tracts under the Mineral Leasing Act of 1920.³ Thereafter the tracts were ruled to be public domain land, the conflicting applications of one or more competitors were rejected, and in 1958 the Secretary issued a lease of the tracts to Wallis under the 1920 Act. See *Morgan v. Udall*, 306 F. 2d 799. After the lease was issued to Wallis, McKenna brought a diversity action against him in Federal District Court in Louisiana seeking to be declared a one-third owner of the lease by virtue of the original joint venture agreement. Pan American also brought a diversity action in the same court to oblige Wallis to perform the option agreement by transferring the lease to Pan American.

The actions were consolidated, and following a nonjury trial the District Court held that neither McKenna nor Pan American was entitled to any interest in the disputed lease. 200 F. Supp. 468. The trial judge ruled that Louisiana law governed the rights of the parties and

general acquired lands are those granted or sold to the United States by a State or citizen and public domain lands were usually never in State or private ownership.

³ It appears that applications filed under the wrong Act are treated as ineffective, 200 F. Supp., at 471 and n. 10; see 43 CFR § 3212.1 (b) (1965), but that filing separate applications under each Act for the same land is allowed.

required a written agreement to create or transfer any interest in a mineral lease, thus excluding oral agreements as a basis for relief in this case. The judge then decided that the written agreements available to McKenna and Pan American contemplated they would share only in leases obtained by Wallis under the Mineral Leasing Act for Acquired Lands and not in any leases granted him under any other law. The court's judgment in favor of Wallis on the question of lease ownership reserved to McKenna and Pan American whatever rights they might have to damages, restitution, or like remedies based on oral agreements or other conduct.

Over a dissent, the Court of Appeals for the Fifth Circuit reversed, filing an initial opinion, 344 F. 2d 432, and after petitions for rehearing, a further opinion adhering to its earlier result, 344 F. 2d 439. The court decided only that the trial judge had erred in applying Louisiana law to the controversy and it remanded for a new trial in which "applicable principles of federal law" would control the issues. 344 F. 2d, at 437, 442. In its latter opinion the Court of Appeals reasoned that the Mineral Leasing Act of 1920 imposed pervasive federal regulation and that the Act's policies and the federal interest would be impaired if Louisiana law were to thwart the transfer of these federally granted leases. The opinion acknowledged an apparent conflict with the Tenth Circuit's decision in *Blackner v. McDermott*, 176 F. 2d 498.⁴ We granted certiorari and invited the views of the United States, 382 U. S. 810, which filed a brief *amicus curiae*. We now reverse the Court of Appeals.

The question before us is whether in general federal or state law should govern the dealings of private parties in an oil and gas lease validly issued under the Mineral

⁴ See also other arguably conflicting decisions in the Fifth, Ninth, and Tenth Circuits collected in 40 Tulane L. Rev. 195, 199, nn. 18-20.

4 WALLIS v. PAN AMERICAN PET. CORP.

Leasing Act of 1920.⁵ Several related matters in the case should be distinguished and laid aside at the outset.

First, we are not concerned with whether under *Erie R. Co. v. Tompkins*, 304 U. S. 64, the Federal District Court might have diverged from state practice on the relevant issues of statute of frauds, parol evidence, estoppel, trust remedies, and so forth, on the ground that they were no more than "procedural" rules or fell under some similar rubric. See generally *Hanna v. Plumer*, 380 U. S. 460. Respondents do not argue these rules are merely "housekeeping" matters on which state and federal courts may ordinarily differ but rather that the federal interest in government-granted mineral leases requires supplanting Louisiana law, in which event the federal rule would normally govern any such case whether in state or federal court. See *Dice v. Akron, C. & Y. R. Co.*, 342 U. S. 359. Second, apart from a pre-empting federal interest, we do not consider suggestions that some law other than Louisiana's should govern because the land at issue may be outside the legal boundaries of the State and transactions between the parties may have occurred elsewhere. The District Court sitting in Louisiana obviously assumed that the State as a choice of law matter would apply its own law to the questions. See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U. S. 487. If any challenge was offered on this point below, it has not yet been passed on by the Court of Appeals. Third,

⁵ How possible federal rules would differ from those used by Louisiana has not been specified precisely. The Court of Appeals intimated that the devices of resulting and constructive trusts, said not to be recognized in Louisiana, might be available under federal law and useful to respondents. It may be thought that federal law would not embody a statute of frauds so oral understandings could be proved. In this instance, we believe the question of applicability of state versus federal law can be decided without further refinement of the issue.

whether on the merits the trial court correctly interpreted and implemented Louisiana law is not before us; presumably that issue was presented to the Court of Appeals but not resolved because of its decision that federal law should apply.

We focus now on the central question in the case. In deciding whether rules of federal common law should be fashioned, normally the guiding principle is that a significant conflict between some federal policy or interest and the use of state law in the premises must first be specifically shown. It is by no means enough that, as we may assume, Congress could under the Constitution readily enact a complete code of law governing transactions in federal mineral leases among private parties. Whether latent federal power should be exercised to displace state law is primarily a decision for Congress. Even where there is related federal legislation in an area, as is true in this instance, it must be remembered that "Congress acts . . . against the background of the total *corpus juris* of the states" Hart & Wechsler, *The Federal Courts and the Federal System* 435 (1953). Because we find no significant threat to any identifiable federal policy or interest, we do not press on to consider other questions relevant to invoking federal common law, such as the strength of the state interest in having its own rules govern, cf. *United States v. Yazell*, 382 U. S. 341, 351-353, the feasibility of creating a judicial substitute, cf. *U. A. W. v. Hoosier Cardinal Corp.*, 382 U. S. —, —, and other similar factors.

If there is a federal statute dealing with the general subject, it is a prime repository of federal policy and a starting point for federal common law. See *Deitrick v. Greaney*, 309 U. S. 190; *Reitmeister v. Reitmeister*, 162 F. 2d 691. We find nothing in the Mineral Leasing Act of 1920 expressing policies inconsistent with state law in

6 WALLIS v. PAN AMERICAN PET. CORP.

the area that concerns us here. In providing for development of public domain lands containing minerals, the Act comprehensively regulates various aspects of the process. For example, it governs issuance of leases among competing applicants, *e. g.*, § 17 (b), (c), 30 U. S. C. § 226 (b), (c); it controls in some measure the actual use of the leased tract, to promote goals such as conservation and safety, *e. g.*, § 30, 30 U. S. C. § 187; and it deals with rent and royalty payments to be made to the Government, *e. g.*, § 17 (d), 30 U. S. C. § 226 (d). Few provisions lend themselves at all to the creation of a federal law of the rights *inter se* of private parties dealing in the leases.

Perhaps most prominent among those that are relevant is § 30a, 30 U. S. C. § 187a, which provides that oil and gas leases shall be assignable.* The Court of Appeals opinion relied on this provision, together with reasons why assignment of leases may promote federal policy, in justifying the use of federal rather than state law. However fitting this approach may be where a State interposes unreasonable conditions on assignability, it can have no force in this instance because Louisiana concededly provides a quite feasible route for transferring any mineral lease or contracting to do so, namely, by written instrument. See 240 F. Supp., at 471 and n. 13. Section 27 (d)(2), 30 U. S. C. § 184 (d)(2), also bears directly on the rights of the parties between themselves by rendering

* Other provisions that have something to do with transfer of lease rights are ones providing for surrender of leases to the Secretary, § 30, 30 U. S. C. § 187; for a time period in which persons may dispose of leases illegally held but involuntarily acquired, § 27 (g), 30 U. S. C. § 184 (g); and for protecting the rights of bona fide purchasers if the Secretary seeks to cancel a lease for violations of the Act, 27 (h), 30 U. S. C. § 184 (h). Nowhere is it suggested how use of Louisiana law on the questions before us might interfere with policies behind these sections, whose provisions basically relate to the rights of private persons *vis-à-vis* the Secretary.

unenforceable any option not filed with the Secretary and any option running for more than three years without prior approval of the Secretary; however, this section enacts a pair of narrow, self-sufficient statutory defenses, which is no reason for creating at large a federal common law of federal mineral lease contracts among private interests.

Nor is respondents' position aided by the provisions fixing qualifications for lessees to the extent of curtailing alien ownership and limiting any lessee or option holder to a maximum number of acres.⁷ The Secretary, who must approve all assignments before the lease obligations or record titles are shifted finally, is entirely free to disapprove assignees however valid their assignments may otherwise be.⁸ Finally, it is said that because the leases are issued by the United States and concern federal lands, there is a federal interest in having private disputes over them justly resolved. Apart from the highly abstract nature of this interest, there has been no showing that state law is not adequate to achieve it.

A concluding word must be said about precedents in this Court, which have been copiously cited in this litigation. The Court of Appeals in its initial opinion and at least one of the respondents in his brief have sought sup-

⁷ §§ 1, 27 (d), 30 U. S. C. §§ 181, 184 (d). Conceivably, the rights of private parties among themselves might be relevant data in deciding whether these sections were violated, *e. g.*, whether an alien "controlled" a lease within the meaning of the statute; since the relevance would itself be decided by federal law, the federal interest is secure.

⁸ Section 30a, 30 U. S. C. § 187a, requires approval unless the assignee is not qualified or fails to post the required bond. Where there is a private dispute as to the validity or effect of an assignment, the Secretary does not decide the question and he will not approve the assignment or take other action until the parties settle their dispute in court. See *McCulloch Oil Corp. of California*, Int. Dept. Decision No. A-30208 (Nov. 25, 1964).

8 WALLIS v. PAN AMERICAN PET. CORP.

port in the general principle, repeated in a number of our cases, that the transfer of property by the United States to a private party is governed by federal law and only subsequent transfers among private parties are subject to state law. *E. g.*, *Wilcox v. Jackson*, 13 Pet. 498, 517; *Buchser v. Buchser*, 231 U. S. 157. Notwithstanding the unchallenged grant of the lease to Wallis, it is apparently argued this conveyed title subject to outstanding equities in favor of respondents and that federal law retains its initial hold on the lease until existing equities are resolved. The important case cited by respondents and the Court of Appeals for this approach, which would presumably confine federal law to governing equitable obligations of the lessee arising prior to his receipt of the lease, is *Irvine v. Marshall*, 20 How. 558. In that case an agent who had purchased land in his own name on behalf of two principals refused to convey one of the principals his interest; although local law aimed to discourage undisclosed purchases by proxy by refusing to enforce such equitable claims, this Court held that federal law displaced local law and ordered that a trust be recognized.

We take the decision in *Irvine* to rest on its most precise explanation: that enforcement of the equitable claim was required because the local rule discouraged purchasing through agents and so threatened to hamper the Federal Government in selling its land. 20 How., at 562. While this appraisal of the interests may be debatable, the use of federal law beyond the stage of the initial grant was explained by a specific federal interest found to conflict with local law. That no conflict exists in the present case has already been demonstrated. Other cases cited to us of federal equity courts resolving private disputes over Government-granted property seem quite distinguishable, for example, because there was no asserted conflict with local law, *Massie v. Watts*, 6 Cranch

148, or because a Government grant itself was flawed in some manner, see *Widdicombe v. Childers*, 124 U. S. 400.

Having concluded that federal law should not govern the present controversy, we vacate the judgment of the Court of Appeals and remand the case to that court so that it may consider any other contentions respondents may have urged, including their claim that they should prevail under Louisiana law.

Vacated and remanded.

MR. JUSTICE BLACK, substantially agreeing with the majority opinions of the Court of Appeals, would affirm its judgment.